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IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. 435

GRADY L. WEST and CLIFFORD C. GRAHAM,

Petitioners,

vs.

EDWARD M. GILBERT, E. L. BRUCE CO., INCORPORATED, CORALOC INDUSTRIES, INC., WILLIAM A. FIO RITO, ISRAEL G. SEEGER, and VINCENT D'SUSA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on May 18, 1966.

Citations to Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, printed in Appendix B hereto, *infra*, pages 56-59, is reported in —— F. 2d ——. (The opinions

of the United States District Court for the Southern District of New York are not reported and are reprinted in Appendix B hereto, pp. 60-69, *infra*.)

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was made and entered on May 18, 1966. The jurisdiction of this Court is invoked under 28 United States Code, Section 1254(1).

Questions Presented

1. Whether it was error and an abuse of discretion to dismiss summarily, on technical grounds, and without a determination on the merits, a suit brought under the Securities Exchange Act by minority stockholders, and without notice of such dismissal to any of the parties.

2. Whether it was error and an abuse of discretion to deny a motion under Rule 60(b)(6) of the Federal Rules of Civil Procedure to vacate an order of dismissal for failure to prosecute where (a) substantive rights of the plaintiffs are affected; (b) where grave fraud on minority shareholders by insiders is charged, based on reasonable beliefs from careful investigation; (c) where the action has been diligently pursued, with more than 1,000 pages of testimony taken in depositions and hundreds of documents marked for identification; (d) where no notice of the dismissal was given to any of the parties or their counsel, and the parties continued with depositions and other activities regarding the case after the order of dismissal; (e) where, once the dismissal was discovered, petitioners moved immediately and expeditiously to have it vacated; and (f) where no prejudice would result to the defendants should the dismissal be vacated.

3. Whether it was error and an abuse of discretion to subordinate the established purpose of the Federal Rules of Civil Procedure guaranteeing that bona fide complaints be carried to an adjudication on the merits to a policy of upholding the District Courts in their efforts to control the movement of litigation on their calendars.

Statute and Rules Involved

The statutory provisions and rules involved are Section 10(b) of the Securities Exchange Act of 1934, 48 Stat. 891, 15 United States Code 78(j)(b); Rule 10b-5 of the General Rules and Regulations Under the Securities Exchange Act; Rules 60(b)(6) and 77(d) of the Federal Rules of Civil Procedure; and Rule 23 of the General Rules of the United States District Court for the Southern District of New York. They are printed in Appendix A, *infra*, pages 53-55.

Statement

This is an action commenced August 23, 1962, by two minority stockholders of Coraloc Industries, Inc., under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 against the controlling stockholders and officers of Coraloc and others for fraud. The complaint alleged that the plaintiffs had been induced by the insider defendants to sell to such insiders the stock and stock options which plaintiffs owned at a lesser price than plaintiffs were entitled to, and without disclosure to plaintiffs of an agreement by defendants E. L. Bruce Co., Incorporated and Edward M. Gilbert to acquire from such insiders such shares and options at a much higher price.

Coraloc held patent rights on swimming pool kits and was engaged in their manufacture and distribution. An agreement had been entered into on July 15, 1960 between Coraloc and E. L. Bruce Co., Incorporated, whereby Bruce

became the sole and exclusive distributor of Coraloc swimming kits and obligated itself to purchase a minimum number of such kits for each of the years 1961, 1962, and 1963. Under such agreement Coraloc granted an option to Bruce to purchase 48,425 shares of Coraloc stock at $5.50 a share. Coraloc also agreed to obtain from its stockholders an additional 19,075 shares, or options therefor, for purchase by Bruce, to be paid for with Bruce common stock on a share for share basis, except that a floor of $11 and a ceiling of $25 were fixed, dependent upon the market price of Bruce at the time it exercised such option rights. The stock and options as to which Bruce had acquired option rights were placed in escrow with the law firm of Miller & Seeger. In approving these arrangements, the California Corporation Commission had required an agreement that all stockholders and option holders be treated equally.

The plaintiffs, as minority stockholders of Coraloc, charged Fio Rito, as president, director and a controlling stockholder of Coraloc, and Seeger, its attorney and the escrow holder of their stock and options, together with officers of Bruce and the two corporations, with fraudulent and deceptive practices and a conspiracy.

The complaint alleges that, as a part of the fraudulent and deceptive devices, the defendants represented that all principal stockholders of Coraloc, including Fio Rito, were placing all of their shares and options in escrow, and that all such shares and options would be acquired by Bruce on an equal basis; that, contrary to such representations, and without the knowledge of the plaintiffs, only 3,575 of Fio Rito's 8,250 options were placed in escrow, and that the defendants did not intend that the shares and options held by Fio Rito would be acquired on the same basis as those of plaintiffs. It was also alleged that, at the time of the Bruce-Coraloc agreement, Graham assigned 8,000 of

his options to Fio Rito on the representation and understanding that such options were to be used in connection with the contract for the common benefit of plaintiffs and Fio Rito, but that instead they were treated as the sole property of Fio Rito, who subsequently gave 5,000 of them to Seeger.

The second and more basic element of the complaint centers about alleged fraudulent conduct with respect to the sale of plaintiffs' escrowed stock and options on April 6, 1962, when the market price of Bruce stock was approximately $30 a share. The essence of the charge is that Fio Rito and Seeger, who were in a fiduciary position to plaintiffs, together with other defendants, conspired by fraudulent means, practices and high pressure methods to induce the plaintiffs to sell their stock and options to Bruce at $5 a share, much below the price of $25 a share to which they were entitled under the contract. The hard core of the claim is that, at the very time that the defendants were engaged in such fraudulent and deceptive practices, they had already agreed that Fio Rito was to get the contract price, or even higher, for the stock and options which he held, including the 8,000 options which he had earlier obtained from Graham.

The complaint alleges that the defendants accomplished their fraudulent purpose by impressing upon plaintiffs that Bruce would not pay the price provided for in the Bruce-Coraloc agreements; that Bruce never would exercise its options; and that unless plaintiffs accepted the offer being made and sold their shares and options at $5 per share on the basis of "take it or leave it", the defendants would cause Bruce to abandon Coraloc and engage in the swimming pool business through a competitor which it had already acquired, thus putting Coraloc out of business and rendering plaintiffs' shareholdings worthless, and letting Coraloc "go down the drain".

Issue was joined by all defendants, and the discovery process commenced. More than 1,000 pages of testimony were taken in depositions, and hundreds of documents were marked for identification.

The case had appeared on the December, 1963, and March, 1964 review calendars in the District Court and, with the consent of all counsel, requests for adjournment were made by and on behalf of all parties, and were granted as a matter of course. A similar request on behalf of all parties was to be made as a matter of course when the case was to be called on June, 1964 review calendar. At that point, the defendants had completed their examinations of the plaintiffs, and plaintiffs had examined five witnesses and were preparing to examine four more. It was understood and agreed among counsel that defendants were entitled to further examination of plaintiffs and that re-examination of witnesses might be had where counsel for a party had not been able to be present when initial examination had taken place, and that further defense witnesses might be examined.

On the call of the review calendar on June 5, 1964, the status of the case was reported to the District Judge conducting the review calendar, to be adjourned with the consent of all parties. It was the understanding of counsel that the case was at that point adjourned and nothing more.

As appears from the opinion of the District Court, denying plaintiffs' motion to reargue, the docket and calendar notations show:

> "June 5, 1964—Called on Calendar Review, order entered extending time to place suit on trial calendar to August 17, 1964."

On June 8, 1964, an order was signed and filed of which, concededly, no counsel for any party received a copy or saw. Such order read as follows:

"U.S. District Court
Filed
Jun 8 1964
S.D. of N.Y.

The above entitled action having come on for review on the Jun 5, 1964, before the Hon. John F. X. McGohey, United States District Judge, and after hearing counsel, it is

ORDERED that the Plaintiff shall file a note of issue for trial, or take other action to obtain a determination of the above entitled action by Aug 17 1964 and it is further

ORDERED that if such action is not taken within the said period, the above-entitled action may be dismissed without further notice, for want of prosecution, without costs.

Dated, New York, N. Y., June 8, 1964

JOHN F. X. McGOHEY
United States District Judge

If case is not placed on T/C Aug 17 1964, Ryan, J. will enter Ex Parte Order dismissing action."

No one was aware (or acted as if they were aware) that Judge McGohey had entered an order on June 8, 1964, directing that plaintiff file a note of issue by August 17, 1964, or "take other action", and that, in default thereof, Judge Ryan would enter, without notice, an *ex parte* order dismissing the action.[1]

[1] Counsel for E. L. Bruce Co. Incorporated only in time for inclusion in its Answering Brief before the Second Circuit discovered a post card notice to it stating merely that an order had been entered on June 8, 1964 in the action, which notice was not received by any other counsel. Counsel for Israel G. Seeger similarly in their Answering Brief before the Second Circuit noted that they had discovered a file memo as to whether an adjournment had or had not been granted as applied for but same was not made available to the Second Circuit or to counsel.

In fact "other action" was taken by plaintiff prior to August 17, 1964. On August 14, 1964, plaintiffs filed in the District Court a notice for the taking of the deposition of Robert C. Leonhardt on August 26, 1964. That deposition was actually taken on October 27, 1964, and signed on December 24, 1964.

Nevertheless, on August 21, 1964, Judge Ryan signed and filed an order, of which no one received any notice and of whose existence all of the parties and their counsel were unaware for more than a year. Such order read:

"U. S. DISTRICT COURT
FILED
Aug 21 1964
S.D. of N.Y.

RYAN, CH. J.

The above entitled action having been called on the Review calendar pursuant to General Rule 23 held on 6-5-64, and counsel at that time having been given till 8-17-64 in which to discontinue, dismiss or otherwise move in connection therewith, and no such action having been taken to date, it is now

ORDERED that the above entitled action be dismissed for lack of prosecution, without prejudice and without costs.

New York, New York
August 21, 1964

SYLVESTER J. RYAN
Chief Judge"

No notice of the dismissal of the action was given to any party or to any counsel. Although Rule 77(d) of the Federal Rules of Civil Procedure requires that upon entry of any order or judgment the clerk shall serve a notice of such entry by mail upon each party, and shall make a note in the docket of the mailing, no such note appears in the

docket. In the Southern District of New York it is also the practice to publish in the New York Law Journal daily the titles of cases in which orders are entered. There was never any such publication in the New York Law Journal.

With all counsel being unaware that the action had been dismissed, proceedings in the action continued. Thus, on October 27, 1964, the deposition of Robert C. Leonhardt was taken, with extensive direct examination and cross-examination. On December 18, 1964—four months after Judge Ryan's order of dismissal—the attorneys for E. L. Bruce Co., Incorporated wrote the attorneys for the plaintiffs concerning a possible further examination by them of the plaintiffs. On December 24, 1964, the Leonhardt deposition was signed. Thereafter Mr. Leonhardt died, necessitating meetings of counsel with plaintiffs, who lived in California, to review the case, to examine additional California records which had become available, and to determine whether further examinations were required.

On September 17, 1965, when plaintiffs' attorneys went to the calendar clerk's office for the purpose of filing a note of issue, it was learned for the first time that Judge Ryan on August 21, 1964, had entered an order dismissing the case.

The record clearly shows—and it is nowhere denied—that immediately on discovery of such dismissal on September 17, 1965 counsel for plaintiffs notified all defense counsel, none of whom had knowledge of the dismissal. It was first attempted to work out arrangements to restore the case. When this proved unavailing, although diligently pursued, counsel, learning of the impending departure for Europe of Chief Judge Ryan, to whom all such applications are made in the Southern District, and so as not to lose further time, immediately prepared an affidavit on the procedural aspects and wrote Judge Ryan on October 1, 1965, with copies to all counsel, requesting a hearing date for such application immediately

on his return. Petitioners' counsel was so notified and a formal motion, incorporating such original affidavit was made for the date set and argued on December 3, 1965. Such motion was denied by order of December 6, 1965 and an application for reargument was made and denied by order of December 22, 1965.

Reasons for Granting the Writ

1. The decision of the Court of Appeals is in conflict with the decision of this Court in *Surowitz* v. *Hilton Hotels Corporation,* 383 U. S. 363, decided on March 7, 1966.

Petitioner in *Surowitz,* like petitioners here, was a minority stockholder who brought an action charging fraud on the part of the officers and directors of the corporation. The complaint, like the complaint here, was verified by the plaintiff pursuant to Rule 23(b), Federal Rules of Civil Procedure. The District Court dismissed the complaint on the ground that, because the plaintiff on oral examination had testified that she did not understand the complaint at all, that she had little knowledge of what the lawsuit was about, that she did not know the defendants by name and did not know the nature of their misconduct, and in signing the verification she had relied upon what her son-in-law had explained to her about the case, her affidavit of verification was false and a nullity, hence Rule 23(b) required the complaint to be dismissed.

The decision of the District Court having been affirmed by the United States Court of Appeals for the Seventh Circuit, this Court granted certiorari and reversed, remanding the case to the District Court for trial on the merits. In its opinion, this Court said:

> "We assume it may be possible that there can be circumstances under which a district court could stop all proceedings in a derivative cause of action, relieve the defendants from filing an answer to charges of

fraud, and conduct a pre-trial investigation to determine whether the plaintiff had falsely sworn that the facts alleged in the complaint were either true or that he had information which led him to believe that they were true. And conceivably such a pre-trial investigation might possibly reveal facts surrounding the verification of the complaint which could justify the dismissal of the complaint with prejudice. However, here we need not consider the question of whether, if ever, Federal Rule 23(b) might call for such summary action. Certainly it cannot justify the court's summary dismissal in this case. Rule 23(b) was not written in order to bar derivative suits. Unquestionably it was originally adopted and has served since in part as a means to discourage 'strike suits' by people who might be interested in getting quick dollars by making charges without regard to their truth so as to coerce corporate managers to settle worthless claims in order to get rid of them. On the other hand, however, derivative suits have played a rather important role in protecting shareholders of corporations from the designing schemes and wiles of insiders who are willing to betray their company's interest in order to enrich themselves. And it is not easy to conceive of anyone more in need of protection against such schemes than little investors like Mrs. Surowitz."

Continuing, the Court said in language fully applicable here:

"We cannot construe Rule 23 or any other one of the Federal Rules as compelling courts to summarily dismiss, without any answer or argument at all, cases like this where grave charges of fraud are shown by the record to be based on reasonable belief growing out of careful investigation. The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion. These rules were

designed in large part to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court. *If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits. Rule 23(b), like the other civil rules was written to further, not defeat the ends of justice. The serious fraud charged here, which of course has not been proven, is clearly in that class of deceitful conduct which the federal securities laws were largely passed to prohibit and protect against.* There is, moreover, not one word or one line of actual evidence in this record indicating that there has been any collusive conduct or trickery by those who filed this suit except through intimations and insinuations without any support from anything any witness has said. The dismissal of this case was error. It has now been practically three years since the complaint was filed and as yet not one of the defendants has even been compelled to admit or deny the wrongdoings charged. They should be. The cause is reversed and remanded to the District Court for trial on the merits." (Emphasis added.)

The charges of fraud and coercion and improper enrichment of insiders made in this complaint, are, as in *Surowitz*, likewise based on reasonable beliefs growing out of careful investigation. It is submitted that the holding in *Surowitz* is not limited to uneducated ladies who sign pleadings, but applies equally to protect all summary dismissals on technical grounds where similar charges are properly made, proceedings begun, and where defendants have not countered with any proof.

Nor has there been any collusive conduct or trickery on the part of petitioners.

That the grave charges of fraud alleged in the complaint here are indeed "shown by the record to be based on reasonable beliefs growing out of careful investigation" is evident from the depositions taken and the affidavits filed with the District Court since the commencement of the action.

The pressures put upon petitioners on April 6, 1962, to sell their shares and options on such "take it or leave it" basis, and the part played by all defendants, have been thoroughly confirmed by appellants' own testimony and by the testimony of Robert C. Leonhardt.

There is no dispute that on April 6, 1962— the very same day on which petitioners agreed to sell their shares and options to Bruce at a price which Fio Rito himself in a letter to Bruce described "as a very low price"—Fio Rito and Seeger met with Gilbert who, on behalf of Bruce, confirmed a prior agreement to purchase their stock and options at the much higher contract price. That such confirmation of such prior agreement was to be forthcoming only upon Fio Rito and Seeger first obtaining petitioners' shares and options at "a very low price" is evident from the letter written by Fio Rio to a vice-president of E. L. Bruce Co., in which he said in part:

> "I am, of course, referring to the option exercised by Bruce on April 6, 1962, to acquire the stock and options held in escrow under the Empire Coraloc agreement of July 15, 1960. As you know, Vinnie and Irwin had previously acquired for Bruce from Graham and West, their interest in the escrowed stock and options at a very low price, and promptly bought and paid for the 48,525 shares of unissued Coraloc stock. With respect to me the remainder of the escrow consisting of 11,575 options deposited by me, it was agreed that payment would be made in accordance with the agreement, at the rate of $19 net value of each such option, to be paid in Bruce stock. * * *

> In addition, as you probably know, I had an agreement with Eddie at the time the options were exercised that I was to deliver my 2,500 shares of common stock and the additional 4,675 options, which I hold, in exchange for Bruce stock on a share for share basis. This agreement was also confirmed by Eddie on April 6, 1962, when the option was exercised at a meeting at which Eddie, Irwin and Seymour Kalb were present with Tex and me. • • •
>
> A year ago last May, we were told that Bruce 'was exercising the options with funds provided under the Lazard Freres agreement.' Instead Bruce acquired the interest of the California stockholders at the time and postponed the exercise of the option then and would not effectuate it until after it had acquired the interest of West and Graham on April 6, 1962."

As a responsible official of E. L. Bruce Co. noted in corporate memoranda,

> "You know some things about Coraloc, I know some things and others know some things; however, no one knows everything. This has been an operation of deals, etc."

Such actions by a fiduciary, if proven, are clearly actionable. *Consolidated Oil & Gas, Inc.* v. *Ryan,* 250 F. Supp. 600 (U.S.D.C. W. D. Ark. 1966).

The examination of Robert C. Leonhardt sets forth the facts most clearly regarding the crucial meeting of April 6, 1962.

"Q. And did you, in fact, meet them the following morning? A. Yes.

• • • • • •

Q. What happened thereafter? A. We discussed the matter of the price, and where the company stood, and what I thought Bruce would offer. Then we walked over

to E. L. Bruce Company and went into the board room with Mr. D'Susa.

Q. Was anybody else there besides Mr. D'Susa? A. At this time he might have had Mr. Polivy in for part of the conversation.

Q. Who is Mr. Polivy? A. He was an officer of Bruce. But this first discussion was largely between D'Susa and myself and Graham and West.

Q. What did D'Susa say? A. D'Susa sat back and delivered an ultimatum that he didn't have much time to wait, he would like to get all this over by 9:00 or 10:00 o'clock or 9:00 o'clock, and that he would give them the $50,000, $51,000, $50,000 and that was that. And if they didn't take it, the heck with them, the company was—wasn't worth the paper it was printed on, that their options and shares were worthless and they had no alternative, so he didn't know what they were bargaining for and they were getting too much as it was, and he didn't recommend that they get this much, but Fio Rito and Gilbert said to give it to them, and that was his unequivocal stand.

Q. What did they say? A. They started off politely saying, 'Well, now you don't understand about—' and he would cut them off and say 'I don't want to go into the history of the deal.' He was very abusive, he was—it was the rudest business meeting I have ever seen taken place or heard of. He was personally abusive. He would reach over to me and say 'Can't you get the creeps to sign?' In their presence. And it was a lousy session. So I finally tried to keep everybody calm and I had a real estate closing, I bought a piece of property in New York, had to go to my closing, so I told D'Susa we had to recess, and that would give me time to talk to them.

* * * * * *

Q. In the period while you were out with them, was there any discussion between you, West and Graham about the proposal? A. Well, first before we left, I requested D'Susa to get Mr. Seeger to come to the meeting and Mr. Fio Rito.

Q. And he said he would. A. And I also requested that he absent himself from the meeting and I thought we could get something done.

Q. Did he agree to that? A. He agreed to that.

Q. After he left, or after you left with West and Graham, did the three of you talk about this? A. Well, we talked about it, and the main essence of the subject matter was whether or not Fio Rito had another deal that was going to go through right after theirs and get a lot more money. And I said 'If that is what your fear is, we want to go back and get it on the record that there are no further deals.'

Q. They asked you this question? A. Yes, they were both suspicious of it.

Q. Did you have any knowledge at that time as to whether there was any further deal? A. I only had the knowledge that Fio Rito had said he wanted to get out as soon as he could.

Q. So you then got back there about 11:00 o'clock? A. Yes.

Q. Who was there? A. Graham and West and myself, for a brief time Mr. Polivy, Mr. Fio Rito came in and spoke to everybody but said he would not participate in the dicussions.

Q. Was D'Susa there when you got back? A. He was there for a few minutes.

Q. Did he say anything? A. And I said, I remember I asked him to please not be at the meeting because he was too excited, and I would rather have Mr. Polivy and Mr. Seeger and Mr. Fio Rito, if possible, continue discussions with Mr. Graham. Mr. Fio Rito wouldn't participate in the discussions other than to come in and say that he was glad to see them, and he didn't think he could be there, that Mr. Seeger could speak for him.

Q. Did Mr. D'Susa put any time limit on their consideration of the proposal? A. He kept putting numerous ones. He said, 'I wanted this done by 9:00 o'clock, and here it

is 11:00,' and he said, 'I am going to throw them out in a few minutes,' and his time limits were delivered by 'I want to throw the creeps out of the office.' And finally he said, 'Well, I will give you—I don't know, so many minutes.'

And then I said, 'Well, if you would be quiet, maybe we could get it done in a few minutes,' and when he was out of the room, he kept telephoning into the room and interrupting the meeting so that the ultimate time he gave us was largely used by his own noise on the telephone.

Mr. Field: During this time you were just alone with Graham and West?

The Witness: No, I was with Mr. Seeger and I think Mr. Polivy was there, and at one moment Mr. Fio Rio was in the room briefly.

Q. Had you given Mr. West and Mr. Graham any advice that morning as to what they should do? A. Yes, I did. I said they should get it definitely stated at that meeting with Fio Rito and Seeger that there was no other deal. And Mr. Seeger was asked specifically and he said, no, there was none, and he said that they didn't have a chance of selling their stock options for many years, everybody knew what kind of guy Gilbert was, and Gilbert wasn't giving them money for the stock options until the thing had turned around and made money, and that their job was ahead of them to earn this money, and that's why they wouldn't, under any circumstances give up any of those options back to Graham and West, that the job was really just beginning to turn Coraloc around to make money and they had no chance of getting any money until this was done.

And Mr. Seeger was very definite. He said, 'You all know what kind of man Mr. Gilbert is, and you know he is not going to give up a lot more money. We are doing this in order to make the Sunset deal go into Coraloc and the alternative that Bruce will buy it outright and all of you can just tear up your stock and go home.'

Q. Had you or West or Graham in the course of the discussions that morning suggested that some other options be turned back to Graham and West? A. I don't know who suggested it, but it was emphatically turned down by Mr. Seeger. I think somebody certainly did suggest it. I didn't.

(A portion of the record was read back by the reporter.)

Q. Was there any reference made in that conversation to options held by Mr. Seeger? A. Yes, yes.

Q. What was the reference? A. Mr. Seeger said he held a number of options, the number I don't recall, but I know he said what it was, and he had worked all these years, and helped the thing although he had gotten fees he wanted to build these up for the future. So there was a definite discussion that he had the options. There is no question about it.

Q. Do you recall Mr. Seeger saying he would swap position with Mr. West or Mr. Graham right then? A. There was a kind of offhand discussion which it wasn't a definite offer on anybody's part to swap.

In other words, Mr. Seeger did certainly say 'I would like to sell my options now too, but I can't, I am locked in' and that, 'You are all very lucky to get this money for them'. He said that.

But as to who would swap with who, they were laughing about it at this time. D'Susa was out of the room so that Mr. Seeger had very calmly presented his side of the thing, and there was no longer any acrimony, and there was some discussion, but I don't remember what it was."

* * * * * *

Page 45:

"Q. Did you return to Florida that same day? A. I went back to my apartment and Fio Rito called and came over to see me.

Q. That same day? A. That same day, yes.

Q. What time of the day was that? A. About 4:00 o'clock, 3:30.

Q. Was anybody else there? A. No, just the two of us.

Q. Did you have a conversation with him? A. Yes, I did.

Q. What was the conversation? A. He was jubilant because he said that he was going to now be able to sell all of his options and stock to Gilbert, that Gilbert had agreed to it verbally, right after the meeting.

Q. At the same price that West and Graham had gotten or at a different price? A. No, he just said he would be able to sell all of them. And I mean, I don't think he told me the price but he said it was on a share for share basis; it wasn't for money.

Q. What did you say? A. Well, I was quite taken aback after all the meetings and the representations by him on the phone during the weeks before, but I frankly didn't know whether to believe him or not, so I just didn't do anything.

Q. Did you try to check it out with Gilbert or anyone else? A. No. I was busy going to Florida. I left Fio Rito sitting in my apartment waiting for Graham and West to come over.

Q. They were all going out to dinner? A. They were all going out together, and I left them there, hurried out to the airport and took a plane.

Q. At a subsequent time did you receive any confirmation of the fact that such a deal had in fact been made with Gilbert that day by Fio Rito? A. Yes. The day that Gilbert left for Brazil.

Q. When and where that day did you learn of this? A. Well, Fio Rito's office was right next to Gilbert's and I was sitting in Fio Rito's office.

Q. At the Bruce Company? A. At the Bruce Company. And there was a board meeting going on in the board room. And Gilbert was bouncing between his own office, the board room, and Fio Rito's. And Fio Rito produced a written

document which he showed me, which was the Bruce Company buying out all of his warrants and options on a share for share basis.

It was an unsigned document, and it was dated April the 6th.

Q. 1962? A. 1962. And he said that Gilbert—he told me before that Gilbert had always said he would do this. But he said he had to get Gilbert's signature on it today.

I said, 'If he doesn't do it today he will do it tomorrow.' He said, 'No, I have got to get it today.' "

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Cross Eaxmination by Mr. Seeger:

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"Did Fio Rito tell you at that time that Gilbert specifically wanted to buy out West and Graham only? A. He didn't put any 'only' on; he said he wanted to buy out West and Graham. And so, by the way, so did Gilbert. Gilbert called me to the office. Gilbert said he wanted to buy them out.

Q. What did he tell you in that conversation? A. He said he was going to try to buy them out sometime and he knew that I had some influence with them, would I help.

Q. Did he say he was going to try to buy anybody else out besides Graham and West? A. No."

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"Q. When I was at the meeting, isn't it a fact that Graham and West made a proposal to me that they would accept the $50,000 or $51,000 offer on condition that I would agree to give them part of the options that I held? A. That's right.

Q. And what did I answer them? A. You said you would not give up your options because they were getting paid out then and there, that they lived in California, that you

were giving too much to work on the deal to help turn it around to make money, so that it would make money, and that you wouldn't be able to be in the position they were of getting out for a long, long time and therefore, you wanted a good equity position in it from then on.

Q. Didn't I also say that I had worked for it previously? A. Yes, and they brought up that you had been paid for it, and I remember that, you and I discussed that.

Q. Did I explain at that time that I had been paid after the fact, that I had gotten the commitment prior to it as a condition for gambling on being able to be paid in the future? A. Excuse me; what commitment?

Q. Commitment to receive the options, at the very beginning before they were in a position to pay me. A. You said that you had gambled on the deal, that you might not have been paid.

Q. And— A. You are going all the way back to the history of when we began.

Q. At that meeting, did I not tell them that they had a choice, that they could either take the offer that was made to them or they could stay on and take their chances with me and with Fio Rito and the others? A. No, I never understood it that way. As I understood what you explained to them, you said that they could take their money and be out of it. Otherwise Sunset was not going to go into it and that it was worthless. But that you wouldn't give up any of your options if they took the money, because you had no chance of selling your options for a long, long time, and that you weren't—you knew that Gilbert wouldn't give this kind of money for your options, that you and Bill had to rebuild the whole company. That is the gist of what I understood happened.

Q. I told them that Gilbert had offered to buy them out and not us; is that right? A. I assume that you did. I know that you didn't say that you had had an offer for your options.

Q. I didn't have one. A. Maybe a lot happened behind your back that you didn't know about.

Q. Maybe it didn't, that you didn't know about. I made it clear then, though, that if they accepted the offer that was all they would ever get, did I not? A. Yes.

Q. And that they would be obliged to sign general releases if they accepted the offer? A. Yes.

Q. And that that meant they would get nothing else? A. Yes, based on the assumption of all the things that had been said in that room being true.

Q. I didn't say that, did I? A. They came and asked me.

Q. I am asking what I said. A. 'When you sign this release you walk out of here with your money and that is all you are going to get.' That is what you said."

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Re-cross Examination by Mr. Seeger:

Page 78:

"Q. How would the agreement made on April 6th, which you say Mr. Fio Rito displayed to you, have been contrary to anything that had been said prior, during that same day? A. Well, specifically the biggest area would be where you assured everybody that there was no other deal going to be made and wouldn't be made for many, many years and it was based on this, plus the fact that I thought the company would go to pieces that I told him to go ahead and take the money.

Q. Have you ever found that there was a deal made prior to that meeting? A. Only Fio Rito's assertion.

Q. That there was a deal prior to that meeting or after? A. No, sir, I am very sorry. I would like to correct that. Only Mr. Fio Rito told me that afternoon, that the deal was made, right after we left the Bruce Company.

Q. What did he tell you was the nature of the alleged deal that was made that afternoon? A. He said on a share for share basis I am going to have about four, five hundred thousand dollars. And he was jubilant.

Q. And he said that that was a verbal commitment that he got from Mr. Gilbert? A. And he said it was made in the presence—excuse me just a moment. If somebody can help me with that advisor that Mr. Gilbert had. In the presence of Mr. Seymour Kalb, Mr. Vinnie D'Susa and himself, and I swear I can't remember whether he said Mr. Seeger was there or not.

Q. But he said that Gilbert promised him what that afternoon? A. To go through the original agreement on a share for share basis and to do it, you know, post-haste, right away.

Q. He said that Gilbert said that? A. Yes.

Q. Right away? A. Well, he didn't say—I'm sorry—when I say 'right away,' he didn't mean that day, but he said he was going to do it at once. I mean, I assume within a month or two.

Q. He told you that? A. That is my assumption. He didn't tell me that. He said, 'I will be out of there pretty soon with all this money.'

Q. But he did say that that was the deal that was made that afternoon? A. Yes, he did.

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The examination of Clifford C. Graham on November 20, 1962 clearly confirmed the basis of the within action. All counsel were present and given the opportunity for cross examination. Copies, with the usual stipulations, are in the hands of all parties. Therein Graham confirmed the requirement that 8,000 of Graham's option be assigned:

> ". . . in trust to William A. Fio Rito, to be used by William A. Fio Rito specifically for the Empire Millwork pending contract or agreement and for the brokers on the street that at that time had been helping to support the Coraloc market. * * *" (p. 42)

Therein Graham stated (and reiterated at later occasions):

> "I was informed at that time by both Bob Leonhardt and Grady West that Bill Fio Rito had told them

unconditionally that if I didn't sign this paper, that he would scuttle the company.

This was another time that I received this threat from Billie." (p. 43)

Therein Graham further stated:

"The purposes were to—a requirement by Empire National by Gilbert, that these options be pledged in escrow, number one; and number two, that whatever brokers had to be compensated with options for helping the market would be done so out of these options; and that at the time that this was all taken care of, that we would all be in the pot on a pro rata basis, and this was the financial representation by Grady West and by Bob Leonhardt, that we would recover on a pro rata basis if there was anything left . . ." (p. 45)

Thereafter, however, additional facts were determined by Graham as set forth in such examination:

Examination by Mr. Seeger:

Page 59:

"Q. When for the first time after the execution of the assignment of July 14, 1960 of 8,000 options did you have any conversation with Fio Rito? A. The only thing I can say is it would be sometime within a thirty-day period from that date, but I can't pin it down because it was just a telephone conversation.

Q. Tell us what you said and what he said in that conversation, to the best of your recollection. A. About the only point that really stands out in my mind was the portion that involved the method of obtaining my signature, which I considered to be duress, and that was that he informed me that he would have scuttled the company if I hadn't signed when I did,

and the balance of the consideration I didn't—but this stood out, because this was what I was mad about.

Q. Did he tell you what he was doing with the 8,000 options? A. No, I don't—if he knew, he didn't indicate to me where they were going at that time.

Q. Did you ask him? A. I am sure I did and apparently I didn't get a satisfactory answer or I would have remembered it. At that time I was specifically interested in my 8,000 options but apparently he didn't satisfy my curiosity.

Q. Do you have any recollection of finding out at that time or any time what Fio Rito intended to do with your options, the 8,000 options? A. I did find out later that—at the time—now, I don't—all of the time that I found these things out, I was assuming that they were all coming from one pot, Fio Rito, Grady West and my options, and I found out that after the California stockholders had been bought out that Pisacani and Horowitz—these are two names that stick in my mind—had received either another thousand or 1100 options.

They performed no—Piscani, at least—Horowitz was compensated for the functions he performed. I couldn't understand this. I never had an opportunity to find out whether this was right or wrong. This was the first time that I found out that people other than those directly involved in our problem were being given options.

The next time, sometime later, and I can't pin this down to any specific time because a lot of things happened during this period of time, and this was considerably later, I found out that—let's see who else was pledged—I found out that you, as an attorney for the company, had been—let's say were expecting or had been pledged 5,000 options, of which I didn't know why, and I didn't know what this had to do with my options.

I questioned Fio Rito on this when it came up. I do remember this in a telephone conversation, and I asked him whether or not you had been paid for your services by the company and he said yes, you had, and I said well, why should you get 5,000 options.

He said to help make the deal, whatever this meant, and he said you were being paid for your services—this conversation went back and forth. I wasn't satisfied and the conversation was changed.

Q. When did that take place? A. Oh, I don't recall when it was first brought up to me, but it was probably a couple of months—well, I don't know, probably a couple of months after. I don't know when it was pledged to you, but it was probably in an area of a couple of months after the original signing of it that we—we discussed this—

Q. Let the man answer. A. It was quite some time after that I discovered this, and—

Mr. Seeger: Let the record show that the witness' answer was changed after being—

Mr. Wels: After counsel stated to him 'Was it not in March of 1962?'

Mr. Seeger: That is correct."

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"Q. Did you ever discuss with me, during that period, the question of the 5,000 options that I had? A. No, I don't believe I did. I only had, I believe, a couple of conversations with you, and they were specifically involving, I believe, sell out of my interest as far as my stock was concerned. It had nothing to do with the options, to the best of my recollection.

Q. You do not recall my telling you at some time that these options were pledged to me at a time before the corporation had any money to pay legal fees?

A. No, definitely not. I don't believe you ever told me that.

Q. And Grady never told it to you? A. No. The only thing I remember about your legal fees was that Grady told me that you would wait for your money, and this was the only thing that was ever referred to me, that—pertaining to your legal fees, that you would wait for your money.

Q. When was this, before the deal was made with Gilbert? A. I believe it was after the first or second meeting that Grady West and Bill Fio Rito had with you, that you had implied, at least as far as Grady's thinking was concerned, that you would be paid but you would bill the company later, or something like that, to make it easy for the company at that time.

This was the only thing that I heard about your pay.

Q. But it did not occur to you at this time that this promise of stock was a fair consideration for my waiting— A. No, this was never indicated to me.

Q. At the time that you received $700 for your 50 options, the other stockholders in California were paid for their stock at a substantial profit, weren't they? A. That is correct."

* * *

On April 6, 1962 petitioner came to New York.

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"Q. Did you have a conversation during the course of this one meeting? A. Yes.

Q. Can you tell us the nature of the conversation, what he said to you and what you said to him, and will you tell us also who was present? A. Present at the conversation were Mr. Leonhardt, I believe, the first conversation, Bob Leonhardt, Vinnie D'Susa, Grady West and myself—at the first conversation—

and as I recall, it was a very explosive conversation, although I never met—

Q. Can you just tell us what was said? A. Well, it was an explosive conversation. I never met Mr. D'Susa, but his attitude was over-antagonistic and his approach was dictatorial. He gave us an ultimatum, he told us very specifically that $21,000 was my price, and I believe he said $30,000 was Grady West's price, and that at this particular meeting if we didn't accept his deal, he would—he would make the deal with Sunset Pools directly to Bruce, and bypass Coraloc and we could paper the wall with our stock."

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"Q. All right. Did you meet him again and speak to him again that day? A. Yes. We were leaving and Bob Leonhardt was mending fences, trying to get us together.

Q. I am concerned about your next meeting face to face— A. I am giving you information how this meeting took place.

We requested the presence of Bill Fio Rito and Mr. Seeger to discuss our problem with them. We informed Vinnie D'Susa that we were going to have this meeting to discuss their relative positions in regard to our position prior to making an agreement or arriving at an agreement with E. L. Bruce and Company, which was being pre-empted by Vinnie D'Susa.

Vinnie D'Susa indicated at that time that whatever we did with Fio Rito and Seeger was our business, it was no concern of his, but we had his final offer from Gilbert.

Q. That was your second meeting with him? A. No. We started our meeting, Vinnie D'Susa walked in and he said, "May I sit down?"

Q. Are we now talking about the first— A. The

second meeting, Vinnie D'Susa included himself in the second meeting, without our request.

Q. Who else was present? A. Bill Fio Rito, Tex Seeger, Grady West, Bob Leonhardt, and myself.

Q. Was Mr. Polivy present? A. Later. I don't believe at the outset—

Q. Was Mr. Polivy present at the first meeting? And will you tell us what D'Susa said to you and what you said to D'Susa on the occasion of your second meeting? A. Well, we were trying to discuss our relative positions with Bill Fio Rito and Tex Seeger—

Q. I am not concerned with— A. He—

Q. Let me interrupt you for a moment. I am concerned with any conversation you may have had at the second meeting— A. I am giving you—

Q. —with D'Susa. A. Right. The conversation Vinnie D'Susa interrupted the meeting, and he once again started reiterating the company's position as to the $21,000 for myself and Grady's figure of $30,000. He also interjected at this point that E. L. Bruce and Company would not make this deal if we made any deals with Bill Fio Rito and Tex Seeger.

In other words, he laid on the line that E. L. Bruce Company wouldn't be interested in dealing with us at a later date, even if we were successful in ending up with some options, and this became a condition of E. L. Bruce Company's position.

At that point, I requested that Mr. D'Susa leave the room because we heard his position, we wanted still to discuss our problem with Bill Fio Rito and Tex Seeger.

Vinnie D'Susa left the room, and my next conversation—you want the next?

Q. Wait until I ask you a question. A. I didn't quite finish the answer.

On walking out of the room, he said, 'You have just five minutes to make your mind up, take it or leave it,' and he dashed out of the room in a rage.

Q. Did you make up your mind in five minutes? A. Well, we didn't have a chance. Thirty seconds later the telephone rang. Vinnie D'Susa got on the phone to Leonhardt and we could hear him—Leonhardt was holding the phone out here, and he said something to the effect of sixty seconds—I could hear this and everyone in the room heard it, and Bob calmed him down a little and put the phone down, and approximately another thirty seconds went by and once again the phone rang and was picked up and he told Leonhardt at that time that he would not even pay our transportation costs, you know.

In the meantime, we were still trying to carry on our discussion with Fio Rito and Mr. Seeger.

Q. Did you meet with Mr. D'Susa again that day? A. Yes, we met with Mr. D'Susa while signing the papers.

Q. How long later was that after these two telephone calls from Mr. D'Susa to Mr. Leonhardt back in that room? A. Probably about five minutes. It wasn't very long. It was shortly thereafter. I think they had some shuffling of papers to do and some other things—it was not long after.

We gave the commitment—we gave the commitment shortly after the last threats.

Q. Were the papers signed? A. They were signed.

Q. Within sixty seconds after the last threat? A. I don't believe it was sixty seconds, but it was shortly thereafter."

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"Q. On that day on April 6th, what did you say to Bill and me about the options? A. That we were interested in a participation, I believe, in the remaining options; that it was disclosed to us on that day that they were available between you and Bill Fio Rito, under you and Bill Fio Rito's control.

Q. That we had them? A. That the two of you had them.

Q. Nobody said they were available for any purpose? A. I believe they were available for your own use.

Q. They were not available to anyone else? A. It was clear that those were your options and Bill Fio Rito's options. What I could not understand is how you, as an escrow holder, suddenly came into control of our interest in those things and how the deal had completely changed to this point.

Q. You asked us to give up part of those options to you and to Grady.

Mr. Wels: What did he say, did he say 'give up' or what did you say?

Mr. Seeger: He will be able to answer it. He knows what he said. I was there. You weren't. Let's he and I have it out.

A. At this time I believe it was probably phrased that we were interested in participating on the remaining options. This was my original understanding. It was one pot and we were interested in participating. We got a cold front from you and Bill.

Q. You said you wanted to participate in the options being held by Bill Fio Rito and me? A. I didn't say yours and Bill's, this did not exist. If you will recall, Tex, when we were talking, I didn't say you specifically or Bill specifically or Grady specifically.

I said that we wanted to participate in the remaining options and this was the only way I had gone into the agreement originally, this was all one pot and I harbored this assumption until the day we walked into the office.

Q. You saw the picture at that time? A. Yes, when Bill and you presented the picture.

Q. What did we tell you? A. You simply told us that—let me see—what did you tell me? I believe you.

told me that you would not allow us to participate in any of the remaining options, that these options were going to be earned, the value of those options were going to be earned because they were going to be valuable in the work that we were going to put in.

The other thing that you said was 'Why should you participate in those options when from this point forward it is going to be our job that makes those options valuable and you will have nothing to do with it.'

Q. What else? A. You said no.

Q. I said you could not have any part of the options? A. That's right.

Q. Did I tell you you had not participated from the day you had gotten into the picture? A. You didn't say that.

Q. Didn't I tell you your people were able to be bought out on the basis of our efforts? A. The only recollection I have, you were speaking of the value of the options.

Q. I told you you would not have any part of the options I held and Bill said he wouldn't let you have any of the options he held. That was definite. A. You said that Grady and I could not participate in any of the options that were remaining. You did not classify any ownership.

Number two, you referred to the Bruce position at this time and this is when you came in and you referred to Vinnie D'Susa. Your last remark, Tex, was that the company would not have any further dealings and I think you referred to the Bruce position, like something—this may be a little in error, but as I recall it, 'The Bruce position will not permit your continued participation,' and you went into the narration of how the stock would become valuable later on.

I think—I know that either you or Bill Fio Rito indicated something about a five-year period. I think it was Bill Fio Rito who did this.

'It will be five years,' he said, 'before we get out of the thing.'

Later, in Bill's office, I loaned Bill $500, Grady loaned him $500. At that time he said, 'You are lucky, we are wired in for five years.'

Q. You don't recall anything else being said? A. I get keyed up on certain points, you know.

Q. Do you remember my telling you that if you did not like the deal the way it was for the cash, not to take it? A. I certainly don't remember that.

Q. Do you remember my telling you that I would swap places with you if you liked? A. If you used that, it was a figure of speech so it was lost some place in that.

Q. Do you remember my telling you that if you took this deal that this was the whole consideration that you were going to get and you were going to sign a release that had my name and Gilbert's and everybody else's? A. No. The first time I noticed your name in that release was when it was placed before me and we questioned that.

Q. What was said? A. Why were you and Bill Fio Rito being released by E. L. Bruce?

Q. Not by E. L. Bruce. A. It was to E. L. Bruce, to them, not you. This question was asked.

Vinnie D'Susa said because that is the only way this deal will go in. Vinnie D'Susa, E. L. Bruce, you and Gilbert, and I couldn't understand why this was the case but it was a Bruce document and you and Bill were being released.

Q. Did he say what was in it? A. He was represented. I don't recall exactly. This was the first time it came up. You didn't volunteer it.

Q. What did that mean when you signed it? A. It meant to me that you and Bill Fio Rito were taking a ride and the blackjack was being furnished by E. L. Bruce and Company.

Q. But when you signed it, you intended to release

Bill and me? A. Under one condition only, that everything was being fairly represented to us at the time of our signing the agreement.

Q. If that was so, you were willing to sign the release? A. Absolutely.

Q. And have no further claim against us? A. At that particular point. We signed that under certain representations.

Q. You knew it was a release? A. Yes, I did.

Q. You knew it would foreclose you from any claim? A. Yes, conditioned on what we were presented as being the case.

Q. What fact was presented to you at that time, that day, that you have since learned was not true?

Mr. Wels: I don't think there is any need to answer that. That appears in the complaint.

Mr. Seeger: Anything in the complaint, he has to answer. You wrote the complaint.

Mr. Wels: Go ahead.

A. The only thing I know is that we were advised that—

Q. By whom?

Mr. Wels: Advised as to what?

A. We were advised—

Q. By whom? A. Let me finish. We were advised that simultaneously with the exception of our agreement in the Bruce office, that you and Bill Fio Rito and the other people that were involved with you had a simultaneous execution of another agreement, or the original agreement, or whatever it was.

This was not disclosed to us at the time we executed it."

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"Q. Let's go on. So that when we discussed this on April 6th, you said you wanted to participate in

the remaining options? A. Well, this was basically what the approach was. I don't remember what the wording was, but that obviously, when we got together with you and Bill, we had already been pretty well harassed and we were already, let's say, pretty much on the defensive as far as the position of E. L. Bruce was concerned as represented by Vinnie D'Susa, so we did request participation on the balance of the options and at this point we still didn't know what the balance was, technically.

Q. When you said the balance, did you mean those which would remain after the ones that had been given away by Bill? A. No. I meant all of the options that were still involved in escrow.

Q. Regardless of who owned them? A. Why certainly. For one reason, that I was always of the opinion that—

Mr. Wels: You said 'who owned them'—

A. Regardless of whose names were on them, because I always harbored the opinion, Tex, that there would be (Page 132) assignments into escrow to other people, and that these assignments, because it was going through escrow, would have to be justified assignments.

I wasn't concerned about whether Bill said this and Bill said that. That didn't mean—"

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"Q. Now, before you asked us to allow you to participate in the remaining options, as you put it, had you reached a figure for the amount that you expected to receive from E. L. Bruce Company, reached an agreement as to the amount with D'Susa? A. No. Before—

Q. Before you asked us to participate, did you know what Bruce was willing to pay? A. Oh, yes. We knew what they were willing to pay.

Q. How much was that, to you? A. $21,000 to me.

Q. Had you decided then to sell them the stock, before you made your request of us? A. No. This $21,000 only involved my 2,000 shares of stock.

Q. That's right. A. It did not involve the options that we were talking about.

Q. And then you asked us if we would allow you to participate in the remaining options and we refused you; is that right? A. Well, I would say this, that you made your position (Page 134) quite clear, as did Bill.

You did most of the talking, that you felt we shouldn't participate, but we were still interested in negotiating until we were stopped by Vinnie D'Susa. He said we couldn't participate—he was in and out of the room like a jack in the box.

Q. I told you that under no circumstances would we give up any options, did I not?

Mr. Wels: Aren't we getting argumentative again?

Mr. Seeger: I am asking a question.

A. I believe you did say this. This was your position.

Q. Right. And do you recall my telling you at that time that if you wanted to stay, you could take your chances with us? A. No, I don't recall—you might have said this some place, you said quite a few things, but I don't recall you telling us that the—what we were talking about in the way of options, they were of no value or very little value at this point.

This was one of the things you were very graphic on in your explanation to us, along with this, when you were giving us this information, that the only way

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that—the reason that you wouldn't in your thinking allow us or be interested in us participating is before

any value were advertised, before any value established on these options these remaining options, you and Bill Fio Rito would have to create the value through your efforts which would take up the five years, so you were wired in and this was when you made the remark at this point, 'I would prefer to be in your position' or 'I would change places with you' or something to that effect.

Q. Yes. You knew, you testified yesterday that Bill was offered $40,000 for his interest? A. Bill was offered $40,000 for his total interest.

Q. This is what he told you? A. According to what he told us.

Q. So the options had value? A. No, because the offer—the explanation for the $40,000, and Bill was talking specifically about stock, he made this clear, Tex, in a telephone conversation—he said, 'They are offering you 25,000, they are offering Grady West 25,000, and they are offering me 40,000'—I mean Bill Fio Rito 40,000.

'The 25,000 is for your stock'—this was number one. He said this specifically, because he was—

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'The 25,000 to Grady is for his stock.'

Now, this is what Bill said, 'his stock.'

The reason they are giving them that much, why they are giving Grady and me—'because Grady was a good guy and he worked hard, he stayed with the company and so the Bruce management feels that he should have $25,000 also. The reason they are giving me $40,000 is because I worked my ass off to put this—keep this company alive,' and these are basically Bill's words.

Q. On April 6th, did Bill tell you then that he was getting $40,000 on April 6th, when you asked to participate? A. Bill told us on April 6th that he

would have to stay wired into the company for five years.

Q. What was Grady selling to Bruce on that day? A. Grady was selling a stock, to the best of my knowledge.

Q. How much, do you know? A. I believe he had 500 shares that were held in escrow.

Q. And how many options? A. He had 5,000 options in escrow. Now, this may have included the options, I don't know. I doubt it."

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"We came in. I wasn't satisfied, but I held to our verbal agreement to split the stock. This was the reason.

When we came in, I didn't realize that the options were not going to be included, some of the remaining options in our negotiations. I didn't realize the negotiations would take the slant that they did. It caught us totally by surprise.

Q. But you realized before you took the check, didn't you? A. I realized one thing, Tex, I took that check understanding that you and Bill Fio Rito were not going to participate—it would take five years before you could get out of the company with any money.

Q. You didn't care how much we got out of it at that time, did you? A. Well, I didn't give it that much thought, Tex.

Q. Did you offer to give us part of the $50,000 cash you were getting, when you asked to participate in the remainder ? A. Well, we weren't getting $50,000 cash.

Q. $30,000 and $21,000 is $51,000? A. I don't recall whether we did or not."

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"Q. You know that you didn't, don't you? A. I don't recall.

Q. Did you raise any objection about the possibility that Bill might get $40,000 for his interest when you only got $21,000 for yours? A. I didn't raise any objection because as far as I knew, Bill nor you were getting any money for a prolonged period of time from Bruce. There was no backside deal made, this was our representation.

Q. All right. And since then you claim there was a backside deal made, as you described it? A. Yes.

Q. What was the deal that was made, according to your information? A. Well, that you and Bill and associates received 20,675 shares of Bruce stock. And $50,000 in cash on the exercising by Bruce of the original agreement that was in escrow on the same day, simultaneously with the buy-out of Grady West and myself.

Q. When did you learn this? A. I first heard of it, that there was something taking place back in, I believe around the end of June or the first of July, in that immediate area.

Shortly after, I believe, Gilbert went to Brazil."

Page 141:

"Q. And when was this backside deal supposed to have been made? A. The same day or prior to our signing of it and receiving the checks at the Bruce office.

Q. Well, which was it, was it made before or after you signed? A. Well—

Q. According to your information? A. Well, I can say this, that initially the information was that it was made before. We received verification from Bruce it was received simultaneously, so all I can lean on is the verification.

Q. What was untrue in what was told to you by Bill or me on April 6th? A. What was untrue?

Q. Yes. A. That there was no deal made with

> Bruce, that we knew everything that was to be known at this point. That you and Bill were fairly representing your position as being tied to Coraloc for up to five years. That any options that were left were only going to be made valuable by the efforts put out by you and Bill Fio Rito and this was the entire picture."

* * * * * * *

The examination of Grady L. West held November 20, 1962 fully shows the merit of the allegation of petitioners. There he confirms the "ultimatum" by D'Susa (p. 6) and the second meeting which included also Fio Rito, Seeger, Graham, Leonhardt (p. 8). As he noted in his examination by Mr. Holland:

> "Q. Had you made up your minds? A. Yes, under the terms that were outlined to us we had no choice. It was either that or let the company go down the drain." (p. 10)

He had noted that in a conversation with Graham prior to the meeting that Fio Rito had stated:

> "* * * He also in this conversation outlined the disposition of Mr. Graham's options that were transferred, supposedly transferred to the escrow from Bill Fio Rito, and incidently, he gave an explanation as to what happened to his own options and stock.
>
> Mr. Seeger: He said they were all pledged to make the deal?
>
> The Witness: Every one of them, and I'm quoting. He said that the deal that Bruce wanted to offer us was $25,000 to me for my interest, $25,000 to Cliff for his interest, and that he was to receive $40,000 because he had worked harder and stayed with it. * * *" (p. 13)

He confirmed the statements of Graham and Leonhardt as to the second meeting:

"Q. Did you participate in any way in the original— A. I might add this, that at the meeting there was a conversation which should be related and I think it is quite pertinent to this matter.

Q. Which meeting are you referring to? A. This was the last meeting immediately prior to our signing the assignment on April 6th.

Q. This was the meeting with Mr. D'Susa? A. At this particular moment, I believe Mr. D'Susa was out of the room and we were talking directly with Bill Fio Rito and Tex Seeger.

When we were asking them what they thought about the continuing possibilities of Coraloc, they said that the only way that this stock would ever be worth anything would be if they made it worth something from this point forward.

Bill said that he was quite unhappy because he was going to stay with it for a long period of time. He told us also that he wanted, his first preference would be to get out and do other things rather than be wired to Bruce, so that we were made to understand that at this point Coraloc would be considered valueless and that the only time the option or any continuing equity would be worth anything would be through their efforts of staying with it and it was made to be worth something by productivity from that point on." (p. 21-22)

West noted the pressure at the April 6 meeting:

"Q. But at the time of the closing, you did convey all your interest in Coraloc and release all claims for $30,000, did you not? A. That's right, because we were pressured into it.

Q. And this pressure consisted of what? A. The

dominating influence of Mr. Vinnie D'Susa which was overbearing, insufferable, insulting. He made numerous allegations that this was the highest price that anyone would ever get for the stock in the near future, that we would be extremely foolish not to take this deal and we could paper the walls with our stock if we didn't—

Q. Isn't it a fact that he said that this was the highest price you could get for the stock? A. I don't recall his exact wording, but the intent was that or the message of his presentation was that this was it or else.

Q. That's right. Did he ever tell you that he was prepared to pay anybody else for the stock? A. No.

Q. For anybody else's stock? A. As a matter of fact, he indicated that there was not going to be any other purchase or acquisition of the stock.

Q. He volunteered this information? A. That is correct." (pp. 77-78)

In such deposition petitioner West confirmed that Fio Rito has said in a prior conversation that he was going to have to stay with the company for the next five years (p. 79), that his options were considered valueless (p. 79) and that in a conversation between Fio Rito and Graham to which West was listening, that Seeger was "to get 5,000 options" (p. 80) and that Fio Rito's "had been wiped out".

He described the release running to Seeger and Fio Rito:

"Mr. Wels: Did you protest signing a release running to Mr. Fio Rito and Mr. Seeger.

The Witness: It was protested.

Mr. Wels: Did you protest?

• • •

The Witness: I believe Mr. Graham did protest it, and I questioned it.

Q. I see. A. At the same time.

Q. What question did you raise? A. The nature of the question was why is Fio Rito and Seeger tied to the contract and general release that was given to Bruce. We were making—in other words, we were making a deal with Bruce; why were you running in on the release clause?

Q. What answer did you get? A. That was given by Mr. D'Susa, as I recall, and he flatly stated that we either sign with these conditions in there or 'If you don't sign it, you won't have a deal.'

Q. You got no answer from me? (Seeger) A. If you answered, I don't remember.

Q. Would it refresh your recollection, the reason for this is that we wouldn't have any future claims with respect to the options which you had asked for? A. No, I don't remember that." (pp. 95-97)

The examination shows that:

"A. We relied on the fact that there was no other deal that there was not likely to be any deals made with you and Bill and whoever was left in this thing, and I believe the time period stipulated was the next five years.

Q. Isn't it a fact Mr. West, that you were told there was a strong possibility that sometime Bill and I could get more for our shares than you were getting that day? A. Yes, I think you expressed that as a hope that by making the company more productive, by turning it into a profitable operation from that point forward, that these holdings would be worth something, but this was reflected as a long term situation.

Q. And I offered to swap positions with you at that time, take cash and get out and let you hold my interest? A. I don't specifically recall that statement." (p. 104)

"Q. But he told you that he, Bill Fio Rito, wanted those 8,000 shares from Graham to him or he was going to take a walk; isn't that what he said? A. He stated at that time that the options would have to come to him, yes, but there were other reasons that he stated that was needed.

Q. What other reasons? A. Well, to facilitate making assignments without every time going back to the coast with requests for signatures by Graham.

Q. What other reasons— A. But this thing changed around a heck of a lot, as you know, during these—

Q. I don't know— A. During these negotiations.

Q. What other reasons were said at this time? A. That was the primary one at that time.

Q. There were no other reasons? A. (No response.)

Q. What other reasons did he say at any time that he wanted Graham— A. The story changed from that point on." (pp. 111-112)

• • •

"Q. Did he ever say anything different? A. Yes, he did." (p. 113)

• • •

"The Witness: I am about to outline it.

A. From the time that I left New York to go back to California, Bill stayed here and I went there to accomplish the things that I outlined before.

During this period of time, we were in constant communication with each other in trying to get this whole thing worked out.

Now, during this period of time, Bill's position was weakened to this extent. I had been trying to get Cliff Graham to go along with this assignment of his position in options to Bill Fio Rito directly, and in conversation after that time with Bill Fio Rito, I told him that Cliff was reluctant to do it on this basis and that we might not be able to get his cooperation to make good the pledge that we were committed to, on this 67 and a half percent control.

And Bill at that time, or during these conversations, said, 'Well, rather than do that, let's put—rather than risk losing Graham's position entirely, let's put these things into the escrow or into a common pot and use them out of there on a pro rata basis.'" (p. 114)

• • •

Pages 117-118:

"Q. You told us they were to be used to give to people in connection with making the deal good, weren't they? A. That is correct.

Q. Do you know of anybody— A. Or anybody else—

Q. That is not what you testified to. Let's go back over it again, if you insist on changing.

Didn't Bill tell you that he wanted these 8,000 options to give away to people who were going to make it good? A. Yes, at that time. That is correct.

Q. Did he ever tell you that he was going to give away any other options than those 8,000 to these people to make this deal? A. That the escrow was to be a common pool of all of our interests, yes.

Q. But did he ever tell you that he was going to do anything else with these 8,000 options other than to give them away? A. Well, I don't recall specifically how he phrased it or what he specifically said, but the assumption was there, and he created the assumption, that these were to be distributed on a pro-rata basis.

Q. Which were to be distributed? A. The common pool of options and stock. Of course, the stock was not the subject of distribution."

• • •

Pages 118-121:

"Q. Is it your position at this time that the 8,000 options that Graham assigned to Fio Rito were not used for the purpose intended? A. It is my belief

that these were misused for the purpose for which they were intended.

Q. In what respect were they misused. A. That they were put into the benefit, the specific benefit of Bill Fio Rito and yourself as manager of that escrow. To your benefit rather than to the common benefit of all the members and contributors to that escrow.

Q. You know that— A. We were misled on this, Tex.

Q. You know that 5,175 options were given to me? A. What was this figure again?

Q. 5,175. A. The figure that was—

Q. Approximately 5,000 options were given to me? A. Yes.

Q. You knew that 1100 options were given to Horowitz? A. I—

Mr. Wels: When you say he—

A. I understood that they were assigned to the benefit of Horowitz and to you.

Q. That's right. When did you find that out? A. The first time that I had solid reason to believe this was when Bill Fio Rito mentioned it in his conversation to Cliff Graham.

Q. Do you recall coming into my office in 1961 when were trying to work out the deal with the purchase of the California stockholders' interest by Bruce? A. I have been in your office many times during that occasion.

Q. Do you recall coming in on that occasion, at any time? A. I don't know what you mean by 'at any time.' I don't know—but I was in your office on several occasions during that time.

Q. And at that time, did we not discuss the anticipated exercise by Bruce of the options with respect to stock which was in escrow at that time? A. We had discussed on many occasions the anticipated exercise of Bruce's options.

Q. Did I not at that time, at your request, show you the figures on how that money was to go, to be distributed? A. No, sir, I certainly don't remember any such disclosure."

And again with reference to the release and the deal:

Page 143:

"Q. What deception do you say was practiced on you with respect to the insertion in the document, Exhibit L for identification, of the release?

Mr. Wels: Of Fio Rito and yourself?

Mr. Seeger: Of the whole release. It is not limited to Fio Rito and myself.

A. The deception being that you were being released on the basis of a contract or a deal that we were making with E. L. Bruce and Company.

Q. Is that a deception? A. That, plus the fact that we were assured both at that meeting and prior to that meeting that there was to be no other deal and we made our settlement on the strength of that, plus the fact that we were not—there was no probability that the remaining options and stock would be worth anything except for a long period of time hence."

2. Although this appeal was argued in the Court of Appeals a month after the decision of this Court in *Surowitz* v. *Hilton Hotels Corporation, supra,* and, although petitioners' argument in the Court of Appeals emphasized the controlling applicability of this Court's decision in *Surowitz,* the Court of Appeals gave no consideration to the decision in *Surowitz* and the principles laid down therein.

3. The Court of Appeals, in affirming the District Court's refusal to vacate the order of dismissal, and finding that such refusal was not an abuse of discretion, indicated that it did so because "This court has frequently upheld

the District Courts in their efforts to control the movement of the great volume of litigation on their calendars."

This Court has said that the basic purpose of the Federal Rules of Civil Procedure is to administer justice through fair trials, not through summary dismissals, and that the Federal Rules of Civil Procedure are designed to "not only permit, but should as nearly as possible guarantee that bona fide complaints be carried on to an adjudication on the merits". To ignore such purposes, and to dismiss summarily so as to clear the calendars, is a subversion of the Rules and an infringement on the due process of law. As Professor Moore has said in 5 Moore's Federal Practice 1119:

> "The mere lapse of time does not justify dismissal if the plaintiff has not been lacking in diligence. Expedition for its own sake is not the goal."

4. The decision of the Court of Appeals is in conflict with the decision of this Court in *Hill* v. *Hawes,* 320 U. S. 520 (1944), and conflicts with the decision of the Court of Appeals for the Second Circuit in *Radak* v. *Norwegian American Line Agency, Inc.,* 318 F. 2d 538 (2d Cir., 1963), and with the decision of the Court of Appeals for the Third Circuit in *Tozer* v. *Charles D. Krause Milling Co.,* 189 F. 2d 242 (3d Cir., 1951).

The giving of notice has been a primary characteristic of our system of justice and this has been incorporated in the Federal Rules of Civil Procedure. Thus, Rule 77(d) provides that "Immediately upon the entry of an order or judgment the clerk shall serve a notice of entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing". Similarly, Rule 73(a) provides that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for

appeal not exceeding thirty days from the expiration of the original time herein prescribed.

In *Hill* v. *Hawes,* 320 U. S. 520 (1944), this Court held that, where the clerk of the District Court had failed to give the prescribed notice to a party required by Rule 77(d) of the entry of a judgment, it was proper for the District Judge to vacate the former judgment and to enter a new judgment of which notice was sent in compliance with the rules. This Court said there at page 523:

> "It is true that Rule 77(d) does not purport to attach any consequence to the failure of the clerk to give the prescribed notice; but we can think of no reason for requiring the notice if counsel in the cause are not entitled to rely upon the requirement that it be given."

In *Radak* v. *Norwegian American Line Agency, Inc.,* 318 F. 2d 538 (2d Cir., 1963), the Court of Appeals affirmed the vacating under Rule 60(b) of a prior order of dismissal for lack of prosecution after the case had appeared on a review calendar (of which notice is prepared in duplicate in the Calendar Office) at which counsel did not appear. Fifteen months after the entry of the order of dismissal, and in a situation where plaintiff had taken no affirmative steps whatsoever in her case, counsel for the plaintiff discovered the dismissal when he attempted to serve interrogatories.

The District Court had held its records to be inconclusive as to whether notice of the calendar call was received, stating:

> "I therefore assume, for the purpose of this motion, that no notice was sent to plaintiff's attorney."

The Court of Appeals stated in its opinion that it believed that the evidence showed that notice of the calendar call was received. However, it held the controlling fact to be that counsel "had received no notice of the *dismissal* of

the action and first learned of it fifteen months later" (Emphasis added).

The Court then proceeded under the "grand reservoir of equitable power to do justice in a particular case" afforded under Rule 60(b)(6) to affirm the restoration of the case by the District Court for "the Rule should be liberally construed when substantial justice will thus be served".

In its opinion in *Radak,* the Court of Appeals pointed out that, had such notice of the dismissal been received, counsel would have been "forewarned" to move within a year. It further said:

> "The circumstances of lack of notice of the dismissal acts as a bar to the efficacious operation of subsections (1), (2), and (3). Had notice of the entry of judgment be given in this case, the plaintiffs would have been forewarned of the necessity of moving to vacate within one year if they wished to preserve the grounds on which they could most heavily reply, namely, counsel's inadvertence or excusable neglect. We do not mean to suggest that the granting of relief under Rule 60(b)(6) is proper in all cases where notice of the entry of judgment is not sent to one of the parties; lack of notice does not ipso facto mean a judgment must or can or should be reopened. A party may learn of the entry of judgment by reading the Law Journal or may be so informed by opposing counsel. Nor is 60(b)(6) relief available for an unlimited time. The rule is still subject to both the reasonable time limitation and the proper exercise of discretion of the district court considering all of the circumstances present in a given case. The granting of such motion should be considered only where lack of notice has operated to prejudice a substantial right or remedy that would otherwise have been available."

Similarly, here, notice was not received. If it had been received, petitioners would have immediately moved and opposing counsel would have objected to the depositions thereafter taken. No other method of learning of the order was possible as the Law Journal did not carry it and other counsel did not know about it. Here, as in *Radak,* a substantial right is concerned, the dismissal of the action with grave prejudice to petitioners. But even stronger than *Radak,* petitioners had proceeded with discovery in which all parties participated both before and after the dismissal. And in less time than in *Radak,* just one month after the year, the dismissal was discovered and steps begun to avoid further lapse of time.

Similarly, the Third Circuit held in *Tozer* v. *Charles D. Krause Milling Co.,* 189 F. 2d 242 (3rd Cir. 1951) (cited in *Radak*), in a similar situation:

> "The recent cases applying Rule 60(b) have uniformly held that it must be given a liberal construction. Matters involving large sums should not be determined by default judgments if it can reasonably be avoided. (Citing cases.) Any doubt should be resolved in favor of the petitioner to set aside the judgment so that cases may be decided on their merits. (Citing cases.) Since the interests of justice are best served by a trial on the merits, only after a careful study of all relevant considerations should courts refuse to open default judgments. We are of the opinion that the court below applied a standard of strictness rather than one of liberality in concluding that justice did not require that the judgment be set aside." (p. 245)

Accord; *Chapman* v. *Henry A. Dreer, Inc.,* 18 F. R. Serv. 60(b), Case 2 (E. D. Pa. 1953).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD H. WELS,
Counsel for Petitioners.

JAMES L. ADLER, JR.,
Of Counsel.

August 9, 1966.

Appendix A

Statutes and Rules

Section 10(b), Securities Exchange Act:

"Sec. 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Rule 10b-5, General Rules and Regulations Under the Securities and Exchange Act of 1934:

"Rule 10b-5. Employment of Manipulative and Deceptive Devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security."

Rule 60(b)(6), Federal Rules of Civil Procedure:

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: * * *

or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than a year after the judgment, order, or proceeding was entered or taken."

Rule 77(d), Federal Rules of Civil Procedure:

"(d) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 73(a)."

Appendix A.

Rule 23, General Rules of United States District Court for the Southern District of New York:

> "Causes which have been pending for more than one year and are not on the trial calendar may be called for review upon not less than fifteen (15) days' notice given by the clerk by mail addressed to the attorneys or proctors of record. Notice of the call of such causes shall be published in the New York Law Journal, or otherwise as the court directs. The court may thereupon enter an order dismissing the cause for want of prosecution, or continuing it, or may make such other order as justice may require."

Appendix B

Opinions and Judgment Below

OPINION

Appeal from order denying motion to vacate an order of dismissal and an order denying a motion to reargue, in the United States District Court for the Southern District of New York, Sylvester J. Ryan, *Chief Judge*. Affirmed.

JAMES L. ADLER, JR., New York, N. Y. (Richard H. Wels, and Moss, Wels & Marcus, New York, N. Y., on the brief), *for plaintiffs-appellants.*

ISRAEL G. SEEGER, New York, N. Y. (Miller & Seeger, New York, N. Y., on the brief), *for defendants-appellees Fio Rito and Seeger.*

THOMAS FIELD, New York, N. Y. (John I. Boswell, and Webster, Sheffield, Fleischmann, Hitchcock & Chrystie, New York, N. Y., on the brief), *for defendants-appellees Bruce Co. and Coraloc Industries.*

LEONARD HOLLAND, New York, N. Y. (Gerald J. Beyer, and Riesner, Jawitz & Holland, New York, N. Y., on the brief), *for defendant-appellee D'Susa.*

PER CURIAM:

Grady West and Clifford Graham appeal from two orders of the United States District Court for the Southern District of New York, Sylvester J. Ryan, *Chief Judge,* denying their motion under Rule 60(b)(6) to vacate an order of dismissal for failure to prosecute, and denying a motion to reargue. We find no error and affirm the orders.

West and Graham, shareholders of defendant Coraloc Industries, brought this action in August 1962, against

Coraloc, its controlling shareholders, officers, and attorney, and against E. L. Bruce Co. for damages and the imposition of a trust. Plaintiffs alleged that they were fraudulently induced to sell their shares and options in Coraloc to insiders, who resold at a profit to Bruce.

Substantial discovery took place, including "1000 pages of deposition" and hundreds of documents marked for identification." In December 1963 and March 1964 the case appeared on the review calendars, and was adjourned upon the request of all counsel. In June 1964, after defendants had completed their examinations, and plaintiff was "preparing to examine at least four more" witnesses, the case was again called under Rule 23 of the General Rules of the United States District Courts for the Southern and Eastern Districts of New York. An order issued June 8 requiring that plaintiffs file a note of issue, or "take other action to obtain a determination of the above entitled action by Aug 17 1964" or else the action "may be dismissed without further notice, for want of prosecution."[1] Plaintiffs filed a notice of deposition on August 14. On August 21 Judge Ryan dismissed the action. Apparently no party or counsel was aware of this, because dismissal no doubt was without further notice, pursuant to the order of June 8, and deposition continued into December 1964. After learning in September 1965 of the dismissal, plaintiffs' counsel moved on December 6, 1965 to vacate the order of dismissal. The motion was denied.

Plaintiffs' attorneys claim they received no notice of entry of the order of June 8, 1964 (or of the order of Au-

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[1] Appellants claim a request for another sixty-day adjournment was granted at the June calendar call. The order of June 8 is otherwise. And in denying plaintiffs' motion to vacate the order of dismissal, Judge Ryan characterized the request at the June calendar call as an application "for an extension of time within which to place this suit on the calendar" (which was, of course, granted up to August 17, 1964). In any case, plaintiffs did not even appear in approximately 60 days.

gust 21). It appears, however, that the June 8 order was noticed. Compare *Radak* v. *Norwegian American Lines Agency, Inc.*, 318 F. 2d 538 (2 Cir. 1963).

The District Court has the power to dismiss for failure to prosecute, on its own motion. The matter is discretionary, and on appeal from such an order, an appellate court will not reverse except for an abuse of discretion. *Link* v. *Wabash R. Co.*, 370 U. S. 626 (1962); *Deep South Oil Co.* v. *Metropolitan Life Ins. Co.*, 310 F. 2d 933 (2 Cir. 1962); Rule 41(b).

Motions to vacate under Rule 60(b) are also addressed to the discretion of the District Court. *Link*, at 636; *Parker* v. *Broadcast Music, Inc.*, 289 F. 2d 313 (2 Cir. 1961); *Darlington* v. *Studebaker-Packard Corp.*, 261 F. 2d 903 (7 Cir. 1959).

In effect this appeal calls into question the District Court's exercise of discretion on both occasions. We find no abuse of discretion. The case was two and one half years old when the 60-day order was entered, and three and one half years old when reopening was denied. The only action taken after the 60-day order of June 8, 1964 was the noticing of a deposition August 14, more than 60 days later, its taking October 24, 1964 and signing December 24, 1964. Even after learning at least by September 1965 of the dismissal, plaintiffs did not move to vacate until December 6, 1965. Even if no notices had gone out, the long delay in moving the case to trial after it had three times appeared on review calendars would justify dismissal. This court has frequently upheld the District Courts in their efforts to control the movement of the great volume of litigation on their calendars.[2] We affirm the action of the court here.

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[2] See, e.g. *Bardin* v. *Mondon*, 298 F. 2d 235 (2 Cir. 1961); *Demeulenaere* v. *Rockwell Mfg. Co.*, 312 F. 2d 209 (2 Cir.), *cert. denied*, 374 U. S. 813 (1962); *Cucurillo* v. *Schulte, Bruns*, 324 F. 2d 234 (2 Cir. 1963). See also, *Ohliger* v. *United States*, 308 F. 2d 667 (2 Cir. 1962); *Newton* v. *United States*, 308 F. 2d 668 (2 Cir. 1962). Compare, *Tradeways Inc.* v. *Chrysler Corp.*, 342 F. 2d 350 (2 Cir. 1965).

Appendix B.

Judgment.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of May, One Thousand Nine Hundred and Sixty-Six.

Present: Hon. J. Joseph Smith,
Hon. Irving R. Kaufman,
Hon. Wilfred Feinberg,
Circuit Judges.

Grady L. West and Clifford C. Graham,

Plaintiffs-Appellants,

v.

Edward M. Gilbert, E. L. Bruce Co., Incorporated, Coraloc Industries, Inc., William A. Fio Rito, Israel G. Seeger and Vincent D'Susa,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and they hereby are affirmed.

A. Daniel Fusaro,
Clerk.
Judgment Entered 6/13/66,
John J. Olear, Jr.,
Clerk.

Appendix B.

Order Denying Plaintiffs' Motion to Vacate the Order of Dismissal, Appealed From.

ENDORSEMENT
62 Civ. 2913

This motion by plaintiffs to vacate the order of dismissal for failure to prosecute entered on August 21, 1964 is denied.

The moving papers offer no explanation or justification for the inadvertence and long delay in making this motion other than that plaintiffs did not know that the order had been entered. In fact it was known to plaintiffs that the case was coming up on the Review Calendar on June 5, 1964 and their attorneys agreed with defendants' counsel to apply for an extension of time within which to place this suit on the calendar, that this request was made without opposition and a 60 day order entered. Nothing was done thereafter at the end of that time by way of placing the suit on the calendar or seeking a further extension.

The suit is now 3½ years old; such delay especially in view of the charges of fraud and duress is not fair to any of the defendants particularly not to corporate defendants and to the attorney who is named a defendant.

Plaintiffs have submitted no affidavits of merit. The lengthy affidavit submitted by counsel is not persuasive.

I have read the complaint and the entire court file and particularly the affidavits of defendants and the testimony quoted therein, and Judge Weinfeld's decision denying plaintiffs a preliminary injunction. From this I join in his conclusion that a "strong probability of plaintiffs' success does not clearly emerge," and that no just reason exists for vacating the order of dismissal.

Motion denied; so ordered.

Dated: December 6, 1965.

S/ SYLVESTER J. RYAN
U. S. D. J.

U. S. DISTRICT COURT
Dec. 6—1965
Filed Dec. 6—1965
S. D. of N. Y.

Appendix B.

Order Denying Plaintiff's Motion to Reargue, Appealed From.

ENDORSEMENT

62 Civ. 2913

Plaintiffs again move to vacate the order of dismissal entered herein on August 21, 1964 for failure to prosecute, to restore the action to the docket and permit the plaintiffs to place the action on a trial calendar and to file a note of issue. A previous motion for similar relief was denied on December 6, 1965.

Plaintiffs state that they are prompted to make this motion for reconsideration of their previous motion based upon the fact that neither the plaintiffs' attorneys nor the defendants' attorneys "received or had any notice of the order of dismissal or even know (knew) of it until it was discovered September 17, 1965" and that the docket sheet does not record that a notice from the Clerk's Office of the notice of entry of the dismissal order was sent to the attorneys which fact "appears to have been overlooked by Judge Ryan." This was not overlooked and was specifically referred to by plaintiffs in their moving affidavit in which it was stated that "no notice of entry of the order of dismissal was received by any of the parties who continued the examinations long after the entry of the order; . . ."

The relief was denied for the plain reason that the action was not up to the time of dismissal, or thereafter diligently prosecuted. The affidavits heretofore submitted disclosed that no legal proceedings were pursued and no depositions were taken since December, 1964.

The docket and calendar notations of this suit show:

August 23, 1962 —Suit filed.

Appendix B.

December 5, 1963—Called on Review Calendar Call for failure to prosecute, adjourned to March 1964 Call.

March 2, 1964 —Again called on Review Calendar Call, again adjourned to June 1964 Call.

June 5, 1964 —Called on Calendar Review Call, order entered extending time to place suit on trial calendar to August 17, 1964.

August 21, 1964 —Order of dismissal without prejudice and without costs entered by Court.

The observation in *Radack* v. *Norwegian American Line*, 318 F. 2d 538, at 542, that "lack of notice does not ipso facto mean that a judgment must, can or should be re-opened" seems most applicable. Motion denied. So ordered.

Dated: December 22, 1965.

SYLVESTER J. RYAN
U. S. D. J.

U. S. DISTRICT COURT
Filed
Dec 22 1965
S. D. of N. Y.

Appendix B.

Opinion re Preliminary Injunction.

EDWARD WEINFELD, D. J.:

This is a motion by the plaintiffs for a preliminary injunction to restrain the sale of certain shares of stock of E. L. Bruce Co., Incorporated (hereafter called Bruce) by two of the individual defendants and, if already sold, to restrain the disbursement of the sale proceeds pending the final determination of this action.[1] The action is brought by the plaintiffs under section 10(b) of the Securities Exchange Act of 1934[2] and Rule X-10-B-5[3] thereunder.

The plaintiffs owned shares of stock and options to purchase stock of Coraloc Industries, Inc. (hereafter called Coraloc). This company held patent rights on swimming pool kits and was engaged in the manufacture and distribution of such products. The defendant Fio Rito was also a stock and option holder of Coraloc, as well as its chief executive officer and a director. Fio Rito, on behalf of Coraloc, negotiated and later consummated on July 15, 1960 an agreement with the defendant Bruce,[4] whereby it became the sole and exclusive distributor of Coraloc swimming kits and obligated itself to purchase a minimum number for each of the calendar years 1961, 1962 and 1963. The

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[1] As originally presented, the motion sought to enjoin the sale of the Bruce stock. Upon the hearing of plaintiffs' application for a temporary restraining order, consummation of the sale was permitted upon the understanding that the proceeds would be held in an attorney's account subject to the Court's disposition of the motion for a preliminary injunction.

[2] 48 Stat. 891 (1934), 15 U.S.C. § 78j(b) (1958).

[3] 17 C.F.R. § 240.10b-5 (1949). See, e.g., Kardon v. National Gypsum Co., 69 F. Supp. 512 (E. D. Pa. 1946).

[4] Then known as Empire Millwork Corporation.

defendant Seeger was the attorney for Coraloc in such negotiations and since has acted as its attorney.

Under the agreement, Coraloc granted to Bruce an option to purchase 48,425 shares of Coraloc stock, authorized but then unissued, at $5.50 per share. Coraloc also agreed to obtain from its stockholders an additional 19,075 shares of Coraloc stock, or the option rights therefor, for purchase by Bruce. The stockholders' shares, if purchased by Bruce, were to be paid for with common stock of Bruce on a share-for-share basis, except that a floor of $11 and a ceiling of $25 was fixed, dependent upon the market price of Bruce at the time it exercised its option rights. The exercise by Bruce of all the options it acquired under the agreement would give it 67½% of Coraloc's voting stock. The stock and options as to which Bruce had acquired option rights were to be placed in escrow with the law firm of Miller & Seeger, of which the defendant is a partner.

The plaintiffs executed assignments of 2,500 shares and 5,000 options to Miller & Seeger to be held in escrow pursuant to the terms of the Bruce-Coraloc agreement. Graham also executed a separate assignment of 8,000 options to the defendant Fio Rito for "use * * * in connection with a proposed contract between [Coraloc] and [Bruce] which will be subject of an escrow to be held by Miller & Seeger, Esqs." The foregoing assignment of stock and options totalled 15,500 shares. These, together with 3,575 options of Fio Rito, totalled 19,075, the number of shares which Coraloc had agreed to obtain from its stockholders, and were to be held (together with Coraloc's 48,425) in escrow by the law firm of Miller & Seeger for delivery to Bruce in the event it exercised its option to acquire them.

The plaintiffs, as minority stockholders of Coraloc, charge Fio Rito, as an officer, director and stockholder of Coraloc, and Seeger, its attorney and the escrow holder of the stock, together with officers of Bruce and the two corporations, with fraudulent and deceptive practices and

a conspiracy. The charge falls into two parts. First, that as a part of the fraudulent and deceptive devices, the defendants represented that all principal stockholders of Coraloc, including the defendant Fio Rito, were placing all their shares and options in escrow with the defendant Seeger, that such stockholders' shares and options would be acquired by Bruce on an equal basis; that contrary to such representations, only 3,575 of 8,250 options and none of the shares of Coraloc common stock owned by Fio Rito were deposited by him under the escrow agreement, which plaintiffs only learned of long after they had placed their shares and options in escrow; and that the defendants did not intend that the shares and options held by Fio Rito would be acquired by Bruce on the same basis as those of the plaintiffs.

It is further alleged that with respect to the additional 8,000 options assigned by Graham to Fio Rito at or about the time of the execution of the Bruce-Coraloc agreement, the defendants falsely represented that such options were to be used in connection with that contract for the common benefit of plaintiffs and defendant Fio Rito; that instead they were treated as the sole property of Fio Rito; that subsequently, 5,000 of such options were given by Fio Rito to Seeger and the balance assigned to Fio Rito's nominees, which plaintiffs say they did not discover until March, 1962.

The second element of plaintiffs' charge, and perhaps the more basic, centers about alleged fraudulent conduct with respect to the sale of their escrowed stock and options on April 6, 1962, when the market price of Bruce stock was approximately $30 a share. Here the essence of the charge is that Fio Rito and Seeger, who were in a fiduciary position to plaintiffs, together with other defendants, conspired by fraudulent means, practices and high pressure methods to induce the plaintiffs to sell their stock and options to Bruce at much below the price to

which they were entitled under the Bruce-Coraloc agreement, at that time $25 per share. The hard core of the claim is that at the very time the defendants were engaged in fraudulent and deceptive practices to induce plaintiffs to accept a much lesser sum than they were entitled to under the agreement, the defendants already had agreed that Fio Rito was to get the contract price, or even higher, for the stockholders' options deposited by him under the Bruce-Coraloc agreement, including the 8,000 options which Graham says he was fraudulently induced to transfer to Fio Rito at or about the time that agreement was entered into.

The plaintiffs also allege that each defendant played a part in this transaction and that the means whereby their fraudulent purpose was effected were that they informed the plaintiffs, and through various means impressed upon them, that Bruce would not pay the price provided for in the Bruce-Coraloc agreement of July 15, 1960; that Bruce would never exercise its option to acquire the Coraloc stock and options; and that unless plaintiffs accepted the offer of Bruce and sold them their shares and options at much below the contract price on the basis of take it or leave it, the defendants would cause Bruce to abandon Coraloc and engage in the swimming pool business through a competitor of Coraloc, which it had already acquired, thus putting Coraloc out of business and rendering plaintiffs' share holdings and options entirely worthless. Plaintiffs further allege that by reason, and in consequence, of the alleged representations, statements and fraudulent conduct of the defendants and the failure on the part of Fio Rito and Seeger to disclose the true state of affairs, they sold Bruce their respective stock and options at approximately $5 per share instead of the contract price of $25.

The plaintiffs also charge that prior to April 6, 1962, the date of the sale of their stock, Bruce had already

agreed to acquire from the defendant Fio Rito 2,500 shares of the common stock of Coraloc and options on an additional 16,250 shares of such stock in exchange for 20,675 shares of Bruce common stock and a cash sum of $50,000;[5] that the defendants Fio Rito and Seeger failed to disclose this transaction which, in itself, was an inducing cause for the plaintiffs' sale at below the contract option price. The defendants Fio Rito and Seeger, after they had acquired 20,675 shares of the Bruce stock as part payment for their options and stock, agreed to sell and did sell 12,264 shares thereof and it is the proceeds of this sale, as well as the balance of the stock, which is the subject of the plaintiffs' motion.

Finally, the plaintiffs charge that as part of the fraudulent scheme the agreement for the sale of their stock to Bruce required them to execute general releases in favor not only of Bruce, but also to Fio Rito, Seeger, Coraloc and Gilbert. It is asserted that these releases are ineffective since the defendants were in a fiduciary position and failed to make a full disclosure of all the material facts with respect to the transaction. Accordingly, they seek damages and ask that a trust be impressed upon the cash proceeds of the sale of the stock, as well as upon the remaining Bruce stock received by Fio Rito and Seeger from Bruce when it exercised its option.

The defendants, needless to say, deny the charges and each and every material allegation of the complaint and affidavits on this motion. Their version of the various transactions sharply differs from that of plaintiffs'. Each charge of fraudulent conduct is challenged and an explanation offered to repel it.

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[5] Paragraph twenty-seven of the complaint, however, alleges that the agreement was for Bruce to acquire 2,500 shares of Coraloc stock and options to purchase 16,000 for "more than 20,000 shares of Bruce common stock", plus approximately $85,000.

The defendants do not, at this stage of the litigation, raise any issue that plaintiffs fail to assert a claim for relief; nor do they question the power of the Court upon proof of the alleged facts upon a trial to grant equitable relief as well as money damages. What they do dispute is that plaintiffs either have supported their basic charges or have made the necessary showing to entitle them in advance of a trial to an injunction which would tie up the proceeds of the sale of the stock.

In order to prevail in this motion there must be a showing of a meritorious claim, probable likelihood of success and an equitable basis for the exercise of the Court's equity power.[6] While there is some evidential support for plaintiffs' claims, there is sufficient countervailing evidence to bring the scales back into balance so that upon the papers here presented a strong probability of plaintiffs' success does not clearly emerge. However, this circumstance alone does not necessarily foreclose relief if other factors are sufficiently present.[7] Plaintiffs assert as the basis for immediate injunctive relief a claim of irreparable injury.

Essentially, plaintiffs seek a money judgment and the impressment of a trust upon the shares or proceeds thereof in order to insure the collection of any judgment which may be awarded. The claim of irreparable injury rests upon the "belief" of plaintiffs' counsel that the proceeds of the sale of the Bruce stock will be dissipated or transferred by the defendants to France and there placed beyond the reach of this Court with the result that any judgment which plaintiffs may obtain will not be satisfied.[8] The

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[6] See Hamilton Watch Co. v. Benrus Watch Co., 206 F. 2d 738 (2d Cir. 1953); Blaich v. National Football League, —— F. Supp. —— (S.D.N.Y. 1962) (62 Civ. 4111).

[7] See Hamilton Watch Co. v. Benrus Watch Co., supra, note 6.

"belief" of counsel is insufficient. The only allegation offered to support the charge that the defendants' purpose is to frustrate the collection of any judgment is that Fio Rito intends to go to France, where the proceeds of the stock sale may be dissipated by him. However, evidence of probative value is lacking. There has been no allegation, much less proof, that Fio Rito plans to leave the jurisdiction for the purpose of defrauding creditors, secreting assets, or to impede the rights either of plaintiffs or creditors. The papers make it clear that Fio Rito's trip or trips to France are in connection with the establishment and promotion of a swimming pool company which acquired license rights under the Coraloc patent and in which he has an interest. Furthermore, the implication that the trip or trips to France, as the case may be, are for the purpose of transferring assets to France is negated by the circumstance that only recently, and during the pendency of this action, Fio Rito purchased a home in Westchester County, where he resides with his family. Finally, it is not denied that Bruce, the corporate defendant, also charged as a co-conspirator, is well able to respond to the full amount asserted in the ad damnum clause. It is not alleged that Seeger, a principal defendant, is without means to satisfy plaintiffs' claim, should they prevail.

Upon all the facts, and in the exercise of discretion, the Court denies the motion for a preliminary injunction.

Dated: New York, N. Y., February 13, 1963.

EDWARD WEINFELD,
United States District Judge.

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[8] Compare De Beers Consol. Mines, Ltd. v. United States, 325 U. S. 212, 222-23 (1945).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 435

GRADY L. WEST and CLIFFORD C. GRAHAM,

Petitioners,

—against—

EDWARD M. GILBERT, E. L. BRUCE CO., INCORPORATED, CORALOC INDUSTRIES, INC., WILLIAM A. FIO RITO, ISRAEL G. SEEGER, and VINCENT D'SUSA,

Respondents.

BRIEF ON BEHALF OF RESPONDENT D'SUSA IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

The only observation this respondent wants to make to the manner in which the petitioners phrase the questions presented is that nowhere does it appear that the order of dismissal affirmed by the Circuit Court of Appeals was by its terms "without prejudice". [See Appendix B, page 62 of petition] There is little doubt that once this case was dismissed "without prejudice" for failure to prosecute the same, petitioners had the right to reinstitute the action.

They still do. Instead they chose to make two motions to set aside the order of dismissal and when both motions were denied, they chose to appeal the same to the Circuit Court of Appeals, and when that court affirmed the order of the District Court, they chose to petition this Court for certiorari.

Accordingly, this is not the kind of controversy that should result in the Court's granting certiorari.

Statement

Rule 40 of the Rules of this Court and more specifically subdivision (e) thereof asks that

> "a concise statement of the case containing all that is material to the consideration of the questions presented"

should be made. Petitioners have taken seven pages for this "concise" statement.

The argument of the petitioners consumes fifty-one (51) pages all but four of which deal with the "facts" as alleged by the petitioners. Nowhere does there appear a summary of argument as subdivision (f) of Rule 40 requires.

Reasons for Denying the Writ

1. Rule 19 of this Court [Considerations governing review on certiorari] states that a review on writ of certiorari is not a matter of right and will be granted only when there are special and important reasons therefor. As a measure of the exercise of this Court's "sound judicial dis-

cretion", criteria are set down which, the rule states, "indicate the character of reasons which will be considered."

Petitioners contend that the Court of Appeals in affirming the decision of the Southern District of New York has come into conflict with an applicable decision of this Court, to wit *Surowitz, etc.* v. *Hilton Hotels Corporation,* 383 U.S. 363. This is their prime basis for this application.

In setting forth their arguments, petitioners on page 10 of their petition state:

> "Petitioner in Surowitz, *like petitioners here,* was a minority stockholder . . . The complaint, *like the complaint here,* was verified . . ." (Emphasis added)

It is respectfully submitted that the similarity ends right there; that these two similarities are insubstantial, have no bearing on this case, and that thousands of cases share these similarities, which are irrelevant to this petition.

In view of the strained attempts on the part of the petitioners to liken the *Surowitz* case to this case so as to say that the Second Circuit failed to follow an "applicable decision" of this Court, it is necessary to show all of the dissimilarities and distinguishing factors that exist between the *Surowitz* case and this case.

(a) The *Surowitz* case was a stockholders' derivative action brought on behalf of plaintiff and other stockholders of the corporation alleging that officers and directors of the corporation had defrauded it of several million dollars. Our Petitioners, while minority stockholders of a corporation, were the original stockholders who formed the corporation and who, with others, sold stock to the public.

The main thrust of their argument is that they accepted approximately $50,000 for their stock while other selling stockholders [Fio Rito and Seeger] secretly and in conspiracy with the buyer [E. L. Bruce Co. Incorporated] and in conspiracy with an employee of the buyer [D'Susa], received a larger price.

(b) In the *Surowitz* case, Mrs. Surowitz did not understand the complaint, could not explain the statements contained therein, had little, if any knowledge what the lawsuit was about, and did not know of the nature of the defendants' misconduct. She in fact verified the complaint in reliance upon what her son-in-law told her about the facts in the case. The District Court for the Northern District of Illinois on motion by defendants and before issue was joined, dismissed the complaint. The Circuit Court of Appeals for the Seventh Circuit affirmed the dismissal, on the ground that Mrs. Surowitz' verification of the Complaint was false because she swore to facts of which she was wholly ignorant, resulting in the pleading being a sham pleading.

This Court reversed and in so doing stated:

> "Mrs. Surowitz, the plaintiff and petitioner here, is a Polish immigrant with a very limited English vocabulary and practically no formal education. For many years she had worked as a seamstress in New York where, by reason of frugality she saved enough money to buy some thousands of dollars worth of stock. She was of course not able to select stocks for herself with any degree of assurance of their value. Under these circumstances she had to receive advice and counsel and naturally she went to her son-in-law, Irving Brilliant. Mr. Brilliant had graduated

> from the Harvard Law School, possessed a degree in economics from Columbia University, was a professional investment adviser and in addition to his degrees and his financial acumen wore a Phi Beta Kappa key."

It was this same son-in-law that purchased Hilton Hotels Corporation stock for his mother-in-law, using her own money for it. Thereafter Mrs. Surowitz received in the mail a notice from Hilton Hotels Corporation announcing a plan to purchase a large amount of its own stock. She took the notice to her son-in-law to have it explained to her. He, disturbed by the notice, immediately set out to make an investigation. As a result of his investigation he and an associate reached the conclusion that something had to be done. Thereafter the complaint was filed. Mrs. Surowitz agreed that it be filed in her name. It was prepared by the associate of her son-in-law; it was read and explained to her by her son-in-law after which she verified it.

The Court stated:

> "Her limited education and her small knowledge about any of the English language, except the most ordinarily used words, probably is sufficient guarantee that the courts below were right in finding that she did not understand any of the legal relationships or comprehend any of the business transactions described in the complaint. She did know, however, that she had put over $2,000 of her hard earned money into Hilton Hotels' stock, that she was not getting her dividends, and that her son-in-law who had looked into the matter thought that something was wrong. She also knew that her son-in-law was qualified to help her and she trusted him . . . Mrs. Surowitz verified the complaint, not on the basis of

> her own knowledge and understanding, but in the faith that her son-in-law had correctly advised her that the statements in the complaint were either true or to the best of his knowledge he believed them to be true."

This Court then went on to state in discussing Federal Rule 23(b) that it

> "was not written in order to bar derivative suits. Unquestionably it was originally adopted and has served since in part as a means to discourage 'strike suits' by people who might be interested in getting quick dollars by making charges without regard to their truth so as to coerce corporate managers to settle worthless claims in order to get rid of them . . .
>
> When the record of this case is reviewed in the light of the purpose of Rule 23(b)'s verification requirement, there emerges the plain, inescapable fact that this is not a strike suit or anything akin to it."

This Court then went on to state:

> "We cannot construe Rule 23 or any other one of the Federal Rules as compelling courts to summarily dismiss, without any answer or argument at all, cases like these . . ."

Unlike the *Surowitz* case, in this case there have been answers, there has been argument, and this is not a case of a stockholders' derivative suit.

In closing, this Court went on to state:

> "It has now been practically three years since the complaint was filed and as yet not one of the defendants has even been compelled to admit or deny the wrongdoings charged. They should be."

Compare that statement with this case, where it is now over four years since the complaint has been filed and where all of the respondents have answered and have denied the wrongdoings charged. In fact this case was three and one-half years old by the time petitioners' original motion for relief under Rule 60(b)(6) was made.

2. Not only isn't this case in conflict with an "applicable decision" of this Court, on the contrary it is consistent and in fact follows an "applicable decision" of this Court.

In the case of *Link* v. *Wabash Railroad Company,* 370 U.S. 626, this Court decided in 1962 a controversy similar to the one presented now. This Court affirmed the United States Circuit Court of Appeals for the Seventh Circuit, which affirmed by a divided vote an order of the United States District Court for the Northern District of Indiana which dismissed that action for failure of the plaintiff to prosecute the same. Certiorari was granted after which this Court upheld the power of the District Court to dismiss an action where the plaintiff's attorney failed to appear at a pre-trial conference.

It should be stated at this point that in this case the dismissal was *without* prejudice and the action could then and still be started anew.

In the *Link* case the District Court dismissed *with* prejudice and that dismissal was upheld by this Court. In doing so this Court stated as follows:

> "The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of

pending cases and to avoid congestion in the calendars of the District Courts.

* * * * * *

Nor does the absence of notice as to the possibility of dismissal or the failure to hold an adversary hearing necessarily render such a dismissal void. It is true, of course, that 'the fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked.' *Anderson National Bank* v. *Luckett*, 321 U.S. 233, 246; 64 S. Ct. 599, 606; 88 L. Ed. 692. But this does not mean that every order entered without notice and a preliminary adversary hearing offends due process. The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct. The circumstances here were such as to dispense with the necessity for advance notice and hearing.

* * * * * *

Accordingly, when circumstances make such action appropriate, a District Court may dismiss a complaint for failure to prosecute even without affording notice of its intention to do so or providing an adversary hearing before acting. Whether such an order can stand on appeal depends not on power but on whether it was within the permissable range of the court's discretion."

3. Certiorari should be denied for the reason that, with respect to this respondent, no merit of any claim has ever been shown.

It is no coincidence that D'Susa's name is really DeSousa and that he is the last named defendant. The manner in which he is referred to in the appendix to the appellants' brief in the Court of Appeals illustrates that as a defendant he was purely an added starter. In petitioners' counsel's "affidavit of merits" (Appx. 7a) this respondent was named three times and a few other times was referred to as "one of the defendants". The first time he was mentioned (Appx. 8a), he was in a merely formal way referred to as an officer of the two corporate respondents.

The next time this respondent was mentioned (Appx. 10a) was as follows:

> "The *gist of this fraud* centered on the *pressure put on plaintiffs* by defendants Fio Rito, Seeger and D'Susa to sell their securities 'or else' at $5 for a total of $51,000 on such date." (Emphasis added)

This is the first time this respondent was charged with a wrong, to wit *putting pressure on the plaintiffs.* It is submitted that "putting pressure" on a seller to consummate a sale is an inadequate allegation of fraud.

Petitioners would be the first to admit that what they sold was not sold to this respondent; that this respondent was not part of an insider group; that this respondent did not realize a profit; that this respondent was in no fiduciary relation with the petitioners and that when the petitioners executed general releases, they ran to all of the respondents except this respondent.

A careful reading of the petitioners' references to this respondent would lead one to believe that the gravamen of his "wrong" was that he issued ultimata, was antagonistic, dictatorial and on occasions, was rude.

On the question of lack of merit regarding all of the respondents, this Court's attention is directed to Appendix B annexed to the petition which is District Judge Weinfeld's opinion denying a preliminary injunction. Judge Weinfeld stated:

> "In order to prevail in this motion, there must be a showing of a meritorious claim, a probable likelihood of success and an equitable basis for the exercise of the Court's equity power. While there is some evidential support for plaintiff's claim, there is sufficient countervailing evidence so that upon the papers here presented *a strong probability of plaintiffs' success does not clearly emerge.*" (Emphasis added)

4. Petitioners' failure to diligently prosecute their action for three and one-half years affords an ample basis for the District Court's refusal to vacate the order of dismissal in this case.

Petitioners do not question the District Courts' inherent power to insist upon diligent prosecution of cases or their power to impose penalties for failure to so do.

Rule 60(b) of the Federal Rules of Civil Procedure provide in part as follows:

> "On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken . . ."

Subdivision 1 of the foregoing rule was not available to petitioners since more than one year had elapsed between the date of the order of dismissal and the motion to vacate the same. For this reason petitioners relied upon subdivision 6.

Professor Moore in *7 Moore's Federal Practice* has considered the propriety of a motion based upon Rule 60(b)(6), where more than one year has elapsed between the order of dismissal and the date of the motion to vacate and set aside the same. He states the following at page 310:

> "Since relief from a judgment on the ground of mistake, inadvertence, surprise, or excusable neglect must be sought not later than a year, relief from a default judgment for want of appearance, where valid jurisdiction over the defendant has been obtained can be justified after the year period only under *extraordinary* circumstances. Whether the party has moved for relief within a reasonable time must be determined in the light of those *extraordinary* circumstances" . . . (Emphasis added)

Professor Moore has also considered the criteria to be used by a District Court Judge in construing Rule 60(b)(6) to determine if the extraordinary circumstances are present. On page 309 he states:

> "Speaking generally, clause (6) is a reservoir of equitable power to do justice in a particular case for any reason, not comprehended in the preceding clauses (1)-(5), that justifies relief. If the motion for relief is based on 'any other reason' so that the District Court has the power to grant relief under Clause (6), *the grant or denial of the motion involves the exercise of a sound legal discretion by the District Court, which will be disturbed by an appel-*

> *late court only for abuse.* Whether the motion was made within a reasonable time is one of the factors to be considered by the District Court." . . . (Emphasis added)

It is Professor Moore's view that the District Court's determination of whether *extraordinary* circumstances exist is discretionary and that such discretion should not be interfered with on appeal except where there is a clear abuse of discretion.

In the case of *Link* v. *Wabash Railroad Company, supra,* this Court agreed with Professor Moore's reasoning, and in that case involving a dismissal for failure to prosecute, held as follows:

> "Whether such an order [of dismissal for failure to prosecute] can stand on appeal depends not on power, but on whether it was in the permissable range of the Court's discretion."

In the case of *Demeulenaere* v. *Rockwell Manufacturing Company,* 312 F. 2d 209 (1962), cert. denied, 374 U.S. 813 (1962), this Court denied certiorari in a case where the plaintiff sought relief from a dismissal based upon its failure to prosecute. The Second Circuit stated:

> "If we are ever to bring the dockets of our trial courts up-to-date and current, the dead wood that has accumulated over the years must be cleared away. This is particularly true of allegedly massive and complicated claims such as the one before us, involving on paper huge sums but, so far as has been disclosed after many years of backing and filling, wholly devoid of merit . . ."

The Court is also respectfully referred to the following two additional cases which concern themselves with the dis-

cretionary power of the District Court in a case such as this:

> *Cucurillo* v. *Schulte, Bruns Schiff Geselschaft M. B. H.*, 324 F. 2d 234 (9 Cir. 1963);
> *Nederlandsche Handel-Maatschappij N.V.* v. *Jay Emm, Inc.*, 301 F. 2d 114 (2 Cir. 1962).

In *Nederlandsche, supra,* the Circuit Court of Appeals for the Second Circuit stated:

> "Moreover, since relief under Rule 60(b) is essentially discretionary, we would be loath to substitute our judgment for that of the trial judge. *Atchison T. & S. F. Ry.* v. *Barrett,* 246 F. 2d 846 (9 Cir. 1957)." . . .

Upon the record before this Court no abuse of discretion by the District Court can be found. Petitioners do not contest the underlying facts with respect to their lack of diligence in prosecuting this action as found by the District Court and as set forth in the opinion of the Second Circuit Court of Appeals, as follows:

> "The case was two and one half years old when the 60-day order was entered, and three and one half years old when reopening was denied. The only action taken after the 60-day order of June 8, 1964 was the noticing of a deposition August 14, more than 60 days later, its taking October 24, 1964 and signing December 24, 1964."

In view of the facts in this case, as set forth above, the District Court would have been remiss in coming to any other result. The Circuit Court of Appeals for the Second Circuit was held in a case that was 2½ years old, that a counsel's carelessness cannot be excused if the Court is to

perform its obligations to the other litigants whose cases are necessarily delayed by such conduct. *Ohlinger* v. *United States,* 308 F. 2d 667 (2 Cir. 1962).

Petitioners have argued on page 48 of their brief that the decision in this case is in conflict with the decision of this Court in *Hill* v. *Hawes,* 320 U.S. 520 (1944). In *Hill,* the plaintiff noticed an appeal from the District Court of the District of Columbia 27 days after the judgment was entered, which was 7 days after the permissable 20 day period to appeal had expired. The Supreme Court found that the Clerk of the District Court had not given the plaintiff notice of the entry of the judgment, and it therefore gave the plaintiff an opportunity to appeal. This determination of the validity of a notice of appeal, diligently given 27 days after the entry of the judgment and *immediately* after the plaintiff became aware of the same, is easily distinguished from the case at bar where the petitioners sat on their hands for almost a full year from the date of their taking of the last pretrial deposition until the date that they moved to vacate the dismissal order. The Circuit Court, in this case, stated:

> "Even if no notices had gone out, the long delay in moving the case to trial after it had three times appeared on review calendars would justify dismissal."

In addition, petitioners have been unable to show by evidentiary proof that they have, or could have, a reasonable expectation of success in their law suit. In fact, no affidavit of merits by the petitioners has been submitted in support of their application. This Court is respectfully referred to the case of *Coclin Tobacco Co. Inc.* v. *Brown &*

Williamson Tobacco Corporation, 353 F. 2d 727 (C.C.A. 2d 1965) in which the facts are similar to ours.

The lack of diligence in prosecuting this action is clear and provides a compelling basis for the dismissal of petitioners' case. Certainly it cannot be held to have been an abuse of discretion to have denied the application to vacate the dismissal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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LEONARD HOLLAND and
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Of Counsel

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IN THE

Supreme Court of the United States

October Term, 1966

No. 435

GRADY L. WEST and CLIFFORD C. GRAHAM,
Petitioners,

vs.

EDWARD M. GILBERT, E. L. BRUCE CO., INCORPORATED, CORALOC INDUSTRIES, INC., WILLIAM A. FIO RITO, ISRAEL G. SEEGER, and VINCENT D'SUSA,
Respondents.

Brief on Behalf of Respondents Fio Rito and Seeger in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Questions Presented

In an action pending since August, 1962, in which substantial discovery had taken place, including 1000 pages of deposition and hundreds of documents marked for identification, when the case appeared on the review calendar for the third time pursuant to Rule 23 of the General Rules for the Southern and Eastern Districts of New York, upon plaintiff's application for a further adjournment a 60-day order issued, requiring that plaintiffs file a note of issue by August 17, 1964, or the action "may be dismissed without

further notice, for want of prosecution". Plaintiffs contend that no notice of this order was given, but counsel for one of the defendants produced in the Court of Appeals, a notice of the entry of the said order, received by mail from the clerk of the court. On August 21, 1964, an order was entered dismissing the action "for lack of prosecution, without prejudice and without costs". No party or counsel was aware of the entry of this order, since it was without notice pursuant to the order of June 8. The only action taken after the 60-day order of June 8, 1964, was the noticing of a deposition August 14, more than 60 days later, its taking October 24, 1964, and signing December 24, 1964. Plaintiffs first learned of the order of August 21, 1964, dismissing the action, more than a year later, on September 17, 1965, and moved to vacate the same under Rule 60(b)(6) of the Federal Rules of Civil Procedure. In the exercise of discretion the District Court denied plaintiffs' motion, upon findings, *inter alia*, that "plaintiffs have submitted no affidavit of merit. The lengthy affidavit submitted by counsel is not persuasive", and that "no just reason exists for vacating the order of dismissal". Plaintiffs' motion for reargument was similarly denied, upon additional findings, *inter alia*, that "the action was not up to the time of dismissal or thereafter diligently prosecuted" and that "no legal proceedings were pursued and no depositions were taken since December, 1964". The Court of Appeals unanimously affirmed. The questions presented are:

1. Whether it was an abuse of discretion for the District Court to dismiss the action for lack of prosecution without prejudice and without costs, on August 21, 1965, without notice, pursuant to the 60-day order of June 8, 1964, entered upon plaintiffs' application for a further adjournment when the case appeared on the review calendar for the third time after two previous adjournments.

2. Whether it was an abuse of discretion for the district court to deny plaintiffs' motion, made more than one year after said dismissal, under Rule 60 (b) 6, to vacate the order of dismissal, and their motion for reargument, upon findings that the action was without merit, and was not diligently prosecuted.

Statement

While the petitioners (plaintiffs) contend that this is a very complicated action under Section 10(b) of the Securities and Exchange Act of 1934, it is really nothing more than a strike action seeking astronomical money damages based upon fictitious claims of common law fraud and duress.

Plaintiffs, as incorporators and founders of defendant Coraloc Industries, Inc. (Coraloc) had received certain stock and options of the said corporation at the time that it "went public". Thereafter, when Coraloc was in financial difficulties, an agreement was made in July, 1960, with defendant E. L. Bruce Company Incorporated (Bruce) (then Empire Millwork Corporation) whereunder Bruce provided financing for Coraloc, became the national distributor of its swimming pools and obtained an option to acquire 67% of its capital stock at an agreed price. As security for Coraloc's performance in the event of the exercise of the option, there were deposited in escrow with Miller & Seeger, Esqs., as attorneys for Coraloc, all of the authorized and unissued Coraloc shares, and by agreement among the principals themselves, a portion of the stock and options theretofore held by plaintiffs Graham and West and defendant Fio Rito, sufficient to make up the required dif-

ference.[1] The business of Coraloc did not flourish and the said shares and options thus held in escrow were virtually worthless, unless Bruce were to exercise its option under the aforesaid agreement (72a, 73a).* In May, 1961, in anticipation of the exercise of its said option, Bruce acquired all of the remaining Coraloc stock and options held by the plaintiffs outside of the escrow, and by their relatives and friends, all at a substantial profit to the sellers (65a). No shares or options held by defendant Fio Rito were acquired by Bruce at that time and Bruce did not exercise its option under the aforesaid agreement, despite assurances from defendant Gilbert, Bruce's president, that it was going to do so. Defendant Gilbert then promised defendant Fio Rito that when Bruce finally exercised its option, it would also take over his shares and options held outside the escrow in a share for share exchange for Bruce stock (73a). Thereafter, on numerous occasions, each of the plaintiffs made independent overtures to defendant Gilbert in an effort to persuade Bruce to acquire his interest in the shares and options held in escrow (70a).

On April 6, 1962, negotiations which had been going on for some time between plaintiffs and defendant Bruce, culminated in an agreement for the sale by plaintiffs to Bruce of their respective interests in the stock and options held in the aforesaid escrow, for a total sum of $51,000.00. Plaintiffs were fully apprised during the negotiations, of a pending deal whereunder Coraloc was seeking, with the aid of Bruce, to acquire the stock of Sunset Pools, Inc. They were told by defendant DeSousa, who represented

---

[1] Contrary to the allegation on page 4 of petitioners' brief, the California Corporation Commission never passed upon the escrow agreement of July 15, 1960. Consequently, it never approved the same and never imposed any requirement thereon (75a).*

* All page references are to the Appendix to Appellants' Brief in the Court of Appeals refiled herein.

Bruce in the negotiations, that while the deal contemplated the exercise by Bruce of its option under the aforesaid agreement, the deal would not be consummated in that form so long as the plaintiffs, who had contributed little to the corporation, remained stockholders of Coraloc. It was self-evident at the time that the exercise of the Bruce option would improve the position of defendants Fio Rito and Seeger, who were the beneficial owners of the bulk of the stock and options remaining in escrow. Plaintiffs requested that defendants Fio Rito and Seeger give up part of their options to plaintiffs as a condition of their acceptance of the Bruce offer. Fio Rito and Seeger refused to do so, and Seeger advised plaintiffs that any benefits that might accrue to him and Fio Rito were well deserved since it was as a result of their efforts that plaintiffs and their relatives and friends had derived profits from their Coraloc stock and options. He also told plaintiffs that they could reject the Bruce offer and retain their stock and options and take their chances along with him and Fio Rito. Without pressure or duress of any kind, plaintiffs elected to accept the Bruce offer for the sale of their stock and options, and as part of the consideration for the payment received, plaintiffs executed general releases to all of the defendants except DeSousa, after a clear explanation of the purpose and effect of the said releases (13a, 71a, 72a).

After the acquisition of plaintiffs' stock and options on April 6, 1962, Bruce exercised its option to purchase 48,425 shares of Coraloc stock at $5.00 per share. This acquisition gave Bruce the requisite control over Coraloc to permit the sale by Sunset Pools, Inc. of its stock to Coraloc, in exchange for Bruce stock, as a tax free exchange. Bruce did not then purchase the stock and options of Fio Rito and Seeger, et al., although it was their belief at the time that the exercise of the option to acquire the 48,425 shares of stock constituted an exercise of the option to acquire

their interest as well. There was no secret deal. Their contention was based entirely upon the provision of the agreement of July, 1960, between Empire (Bruce) and Coraloc, the terms of which were well known to plaintiffs. At a meeting with defendant Gilbert, then President of Bruce, that afternoon, he acknowledged Bruce's obligation to purchase the remaining options in escrow, without fixing a time for the consummation of the purchase, and reaffirmed his wholly independent promise to Fio Rito to acquire his personally held stock and options in a share for share exchange for Bruce stock. There was nothing sinister or secretive about this. The plaintiffs, by their own admission, knew since December, 1960, that Fio Rito held stock and options outside the escrow and they themselves had, in May 1961, as above noted, sold their personally held stock and options to Bruce for a cash consideration (65a, 73a, 74a).

After the resignation of defendant Gilbert as President of Bruce, in June, 1962, the Bruce people let it be known that they were going out of the swimming pool business. Thereupon, defendant Fio Rito and Seeger entered into negotiations with Bruce for the sale of their stock and options based upon the aforestated contention that Bruce was contractually obligated to purchase the same by reason of the exercise of its option on April 6, 1962. The demand was for the option price of $19.00 per share. Settlement was made in part for Bruce shares at a declared value of $12.60 per share, which were ultimately sold at $7.00 per share (74a, 75a). It was at the time of the consummation of the latter sale that plaintiffs made their application for a temporary injunction. In denying plaintiffs a preliminary injunction, Judge Weinfeld said:

> "In order to prevail in this motion there must be a showing of a meritorious claim, probable likelihood of success and an equitable basis for the

> exercise of the Court's equity power. While there is some evidential support for plaintiff's claim, there is sufficient countervailing evidence to bring the scales back into balance, so that upon the papers here presented a strong probability of plaintiff's success does not emerge'' (56a).

This case was called on the review calendar several times and was adjourned each time, until an order was entered upon plaintiffs' application for a further adjournment, on June 8, 1964, which

> "Ordered that the plaintiffs shall file a note of issue for trial or take other action to obtain a determination of the above entitled action by August 17, 1964'' and further
>
> "Ordered that if such action is not taken within the said period, the above entitled action may be dismissed without further notice, for want of prosecution, without costs'' (84a, 85a, 100a).

Pursuant thereto, upon plaintiffs' failure to take any action thereon, the action was dismissed by order of the Court on August 21, 1964. A notification card recently discovered in the file of Webster, Sheffield, Fleischmann, Hitchcock & Chrystie, attorneys for defendants Bruce and Coraloc, confirms notice to the parties hereto of the order of June 8, 1964. No notice of the order of dismissal of August 21, 1964, was received by counsel since none was required by the plain terms of the order of June 8, 1964.

Notwithstanding the foregoing, plaintiffs by their own admission took no steps to file a note of issue until September 17, 1965, more than one year after the action had been dismissed (34a, 84a, 85a), and almost eleven months after the last deposition had been taken on October 27, 1964, pursuant to notice filed August 14, 1964 (90a).

Reasons for Denying the Writ

No substantial grounds for the granting of certiorari are to be found in the petition herein, in which the principal reliance is upon petitioners' presentation of their own version of the particular facts of the case. There is no real or apparent conflict between the decision of the Court of Appeals herein and any decision of this Court or of the Court of Appeals of any other circuit. The petitioners herein, in fact seek nothing more than to have this august body review a decision of the district court, which was unanimously affirmed by the Court of Appeals. That decision involved the exercise of a sound discretion by the district court, in denying plaintiffs' motion to vacate the order dismissing their action for lack of prosecution, without prejudice. Manifestly, no important question of law is presented in the petition to warrant the consideration of this Court.

Argument

1. Petitioners claim a conflict between the decision of the Court of Appeals in the case at bar and the recent decision of this Court in *Surowitz* v. *Hilton Hotels Corporation,* 383 U. S. 363. The alleged conflict does not in fact exist. There is no true similarity between the cases. The most significant difference between them lies in the fact that *Surowitz* was dismissed for lack of a proper verification, "with prejudice", while the case at bar was dismissed for lack of prosecution, "without prejudice".

In *Surowitz* this Court held that Rule 23(b) of the Federal Rules of Civil Procedure, does not require the dismissal of a stockholders' derivative complaint, verified by an uneducated woman, illiterate in economic matters, where grave charges of fraud were shown by the record

to be based upon reasonable beliefs growing out of careful investigation, and where over a period of three years, not one of the defendants had ever been compelled to admit or deny the wrongdoing charged.

The case at bar is clearly not a derivative action in form or substance. Plaintiffs' claim that their complaint, like that in *Surowitz,* had been verified pursuant to Rule 23(b), is obviously incorrect, since that Rule is specifically limited to shareholder suits which are derivative (secondary) in nature (Moore's Federal Practice, Second Edition, Vol. 3, p. 3506).

In this case, all of the defendants had answered, and specifically denied all of the plaintiffs' charges. In addition, extensive depositions were taken, including those of both plaintiffs and the defendant Gilbert, with approximately 1000 pages of testimony, and hundreds of documents marked for identification. The record clearly shows that the allegations of fraud in the complaint are wholly fictitious and without foundation in fact, and, indeed, were directly refuted for the most part by the sworn testimony of the plaintiffs themselves (63a through 70a). Lengthy affidavits were submitted on plaintiffs' motion for a temporary injunction, which was denied upon the court's finding that "upon the papers a strong probability of success does not emerge". Equally lengthy affidavits were submitted upon the motion to vacate the order of dismissal, which was also denied upon the court's finding, in part, that "plaintiffs have submitted no affidavits of merit. The lengthy affidavit submitted by counsel is not persuasive".

In the case at bar, plaintiffs are two of the original promoters of Coraloc Industries, Inc. After protracted negotiations, they sold all of their promotional stock and options, out of escrow, to E. L. Bruce Company, Incorpo-

rated, at a very substantial profit, albeit at a figure lower than the option price established by the Empire (Bruce)-Coraloc agreement of July 1960. Although they had with full knowledge of all the facts executed releases to all of the defendants, at that time, plaintiffs thereafter brought this action, seeking astronomical damages, for the alleged fraud of the defendants in the said sale, based solely on the fact that defendant Fio Rito had, some months later, received a better price, albeit not more than the option price, for his stock and options, after Bruce had, in fact, exercised its option under the aforesaid contract. Unlike *Surowitz,* the record herein reveals this case to have all the earmarks of a strike suit.

2. Petitioners urge that the decision of the Court of Appeals herein is in conflict with the decision of this Court in the case of *Hill* v. *Hawes* (1944), 320 U. S. 520. Actually the two cases are perfectly consistent. In *Hill* this court affirmed the action of the district court judge in vacating a judgment, in the exercise of a sound discretion, while the same was within his control. In this case the Court of Appeals has affirmed the action of the district court judge in denying, in the exercise of a sound discretion, plaintiffs' motion to vacate the order of dismissal.

It is noteworthy that Rule 77(d) relied on by petitioners herein, was amended by the Congress in 1946, to avoid just such situations as occurred in *Hill* v. *Hawes, supra.* The *1946 Committee Note to Amended Subdivision (d),* states in part as follows:

> "Rule 77 (d) as amended makes it clear that notification by the clerk of the entry of a judgment has nothing to do with the starting of the time for appeal; that time starts to run from the date of entry

of judgment and not from the date of notice of the entry. *Notification by the clerk is merely for the convenience of litigants.* And lack of such notification in itself has no effect upon the time for appeal; but in considering an application for extension of time for appeal as provided in Rule 73(a), the court may take into account, as one of the factors affecting its decision, whether the clerk failed to give notice as provided in Rule 77(d) or the party failed to receive the clerk's notice. It need not, however, extend the time for appeal merely because the clerk's notice was not sent or received. It would, therefore, be entirely unsafe for a party to rely on absence of notice from the clerk of the entry of a judgment, or to rely on the adverse party's failure to serve notice of the entry of a judgment." (Emphasis supplied.)

Moore's Federal Practice, Second Edition, Vol. 7, pages 4003, 4004.

The legislature having amended Rule 77, to preclude the enlargement of the thirty-day time to appeal on the basis of lack of notice of entry of judgment, in order to insure the finality of judgments, can certainly not have intended that a judgment of dismissal should be invalidated by the absence of notice or even that the one year statute of limitations of Rule 60(b) should be thereby extended.

3. Petitioners contend that the decision of the Court of Appeals herein is inconsistent with its own decision in *Radak* v. *Norwegian America Line Agency, Inc.,* 318 F. 2d 538 (2d Cir., 1963). Here, too, it is clear that the two cases are completely consistent. In *Radak,* as in the case at bar, the Court of Appeals held that the district judge had the power, in the exercise of a sound discretion, to grant or deny relief under Rule 60(b)(6), in a case where no notice

of the entry of the order of dismissal was sent. The Court itself distinguished this case from *Radak*, in its finding that the order of June 8, was in fact noticed. (Appendix B, page 58 of the Petition.) Furthermore, in *Radak*, at pages 542 and 543, the Court said:

> "We do not mean to suggest that the granting of relief under Rule 60(b)(6) is proper in all cases where notice of the entry of judgment is not sent to one of the parties; lack of notice does not *ipso facto* mean that a judgment must, can or should be reopened. * * * The rule is still subject to both the reasonable time limitation and to the proper exercise of discretion by the district court considering all of the circumstances present in a given case."

In affirming the action of the district judge, in the instant case, the Court of Appeals found no abuse of discretion by the district judge, and after noting the lack of activity in the case after June 8, 1964, said:

> "Even if notices had gone out, the long delay in moving the case to trial after it had three times appeared on review calendars would justify dismissal." (Appendix B, p. 58 of the Petition).

4. The alleged conflict between the decision of the Court of Appeals herein, and the Third Circuit decision in *Tozer* v. *Charles A. Krause Milling Co.*, 189 F. 2d 242 (3rd Cir. 1951), does not exist. In both cases the Courts recognized that the granting of relief under Rule 60(b)(6) of the Federal Rules of Civil Procedure, rests in the sound discretion of the district judge which should not be disturbed unless there has been an abuse of such discretion. In *Tozer* the Court held that the finding of the district court that the defendant did not present a meritorious defense, was erroneous, and that the failure to set aside the default

judgment constituted an abuse of discretion. In the case at bar, the Court of Appeals affirmed the action of the district court in denying the motion to vacate the order of dismissal on the finding that the plaintiffs failed to present a meritorious cause of action, and held that there was no abuse of discretion.

Notwithstanding the finding by the district judge of lack of merit in the plaintiffs' cause, and the unanimous affirmance thereof by the Court of Appeals, petitioners have devoted by far the greatest portion of their petition to a repetition of selected portions of the testimony from the record filed herein. We do not wish to burden this Court with a restatement herein of the detailed recitals of the Seeger affidavit (62a through 76a), but we beg the indulgence of the Court for a brief reference to a portion of the evidence contained therein, which completely demolishes the principal charges of fraud in plaintiffs' complaint.

Paragraph "Nineteenth" of the complaint charged Fio Rito and Seeger with fraud and conspiracy based on alleged false representations to plaintiff "that all of the stockholders of defendant Coraloc Industries, Inc., including defendant William A. Fio Rito, were placing all of their Coraloc shares and options in escrow" (43a). As is clearly demonstrated in the Seeger affidavit (63a to 66a)* no such representation was ever made; neither of the plaintiffs deposited all of his shares and options in escrow; their friends and relatives didn't deposit any; they knew the total number of shares required to be deposited by the Empire (Bruce)-Coraloc agreement; and they knew that Fio Rito did not deposit all of his shares and options.

The secondary charge in the same paragraph that defendants had falsely represented that the shares and options of all the stockholders "would be acquired on an

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*Reference on p. 66a to paragraph "18" of the Wels affidavit should read paragraph "10".

equal basis under the said agreement" is absurd on its face. In the first place, there was no such provision in the agreement. Secondly, there could have been no reliance upon any such alleged representation, since the record is clear that plaintiffs and their relatives and friends sold their shares and options held outside the escrow, at substantial profits, in May 1961 (65a), without regard for the fact that Bruce was not buying any of the defendants' securities (15a) and thereafter plaintiffs themselves negotiated with Bruce for the sale of the shares and options which they had deposited in escrow and finally sold the same on April 6, 1962, without regard for the fact that defendants' securities in escrow were not then being purchased (70a).

The charges of fraud in paragraph "Twentieth" of the complaint (43a) are equally without foundation in fact. Therein, defendants are charged with falsely representing to the plaintiffs that it was necessary under the contract for Graham to assign 8,000 of his options to Fio Rito, and that they misappropriated the same to their own use. The testimony of the plaintiffs themselves, quoted in the Seegar affidavit (66a to 70a) clearly shows that no such representation was made or relied on; that Fio Rito had in fact insisted on the assignment of the Graham options, as a condition of his continued efforts on behalf of Coraloc, with the understanding that the benefits thereof were intended to accrue to the benefit of defendant Seeger and others who helped Coraloc while it was in financial difficulties. It is evident, therefore, that there was no fraudulent representation and no misappropriation of Graham's options.

On the basis of the foregoing and the remainder of the Seeger affidavit, as well as the complete record of testimony taken in this case, it becomes apparent that plaintiffs have not and cannot establish a meritorious cause of ac-

tion. Judge Ryan so found. In his opinion (5a) he stated:

> "Plaintiffs have submitted no affidavits of merit, The lengthy affidavit submitted by counsel is not persuasive.
>
> I have read the complaint and the entire court file and particularly the affidavits of defendants and the testimony quoted therein, and Judge Weinfeld's decision denying plaintiffs a preliminary injunction. From this I join in his conclusion that a 'strong probability of plaintiffs' success does not clearly emerge', and that no just reason exists for vacating the order of dismissal."

The absence of a meritorious cause of action precluded the favorable consideration of plaintiffs' prayer for relief under Rule 60(b)(6).

Coclin Tobacco Co., Inc. v. *Brown & Williamson Tobacco Corporation,* 353 F. 2d 727 (CCA 2d, 1965);

7 Moores Federal Practice, 299;

Sebastiano v. *U. S.,* 103 F. Supp. 278, aff'd 195 F. 2d 184 (6th Cir., 1952);

Assman v. *Fleming,* 159 F. 2d 332, 336, 337 (8th Cir., 1947);

U. S. v. *Williams,* 109 F. Supp. 456 (U. S. D. C. W. D. Ark., 1952).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ISRAEL G. SEEGER,
Counsel for Respondents Fio Rito and Seeger.

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IN THE

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OCTOBER TERM, 1966

No. 435

GRADY L. WEST and CLIFFORD C. GRAHAM,
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against

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR RESPONDENTS E. L. BRUCE CO., INCORPORATED AND CORALOC INDUSTRIES INC., IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR RESPONDENTS E. L. BRUCE CO., INCORPORATED AND CORALOC INDUSTRIES INC., IN OPPOSITION

Petitioners seek review of an order of the District Court denying their motion under Rule 60(b)(6) to vacate an order which dismissed the action for lack of prosecution, without prejudice, more than one year before the making of the motion to vacate.

We do not want to burden the Court with a repetition or elaboration of the reasons for the denial of the petition, advanced in the brief of the other respondents. It is clear that this is not an appropriate case for review by this Court.

Assuming for the sake of argument that the District Court had under Rule 60(b)(6) the power to entertain the motion made more than one year after the dismissal, notwithstanding that the grounds of the motion appear to fall within Rule 60(b)(1), as pointed out in the opinion of the Court of Appeals herein, a motion under Rule 60(b)(6) is addressed to the discretion of the Court.

Petitioners have failed to state any valid reason for the granting of review. There is no merit to the petitioners' contention that the decision below is in conflict with the decision of this Court in *Surowitz* v. *Hilton Hotels Corporation* 383 U. S. 363. The cases are totally dissimilar. The decision below is not in conflict with any decision in another circuit. No important question of law is involved.

All that would be accomplished by review here would be an adjudication whether in the view of this Court the District Court abused its discretion. Such determination would have little value as a precedent.

The history of the action set forth in the opinions below demonstrates that the case was within the area in which discretion could be exercised against reopening by reason of the laxity in prosecution. Beyond that, while petitioners devote over 30 pages of the petition to the merits of the action, it is demonstrable that their claim at least against Bruce and Coraloc is without merit.

Bruce was not involved in any dealings which Fio Rito and Seeger had with the plaintiffs prior to April 6, 1962.

On April 6, 1962, plaintiffs obtained $50,000 from Bruce for their Coraloc stock and options. Except for Bruce's intentions thereafter to revitalize Coraloc, these shares and options were unquestionably worthless. Upon Bruce's abandonment of these intentions, the Coraloc stock became permanently worthless.

Thus, ironically, the transaction complained of was a windfall to the plaintiffs in which they realized $50,000 for stock, which was worthless when they sold it and which has been worthless ever since.* Had Bruce not, as plaintiffs maintain, pressed them into selling their Coraloc stock, plaintiffs would remain the owners of worthless scraps of paper. Clearly, to say the least, plaintiffs have suffered no damage at the hands of Bruce.

Indeed, following the commencement of the action, plaintiffs' counsel, Mr. Wels, stated to us that he considered Bruce an innocent victim and offered to discontinue the action against Bruce (82a).** The discontinuance of the action against Bruce was not carried out because of procedural difficulty.*** Thus the dismissal below had the effect of carrying out plaintiffs' counsel's 1962 offer to discontinue the action against the corporate defendants.

In light of the foregoing, putting to one side the prejudice resulting to defendants from inability to cross-examine at the trial plaintiffs' witness who died while this action was dormant, denial of reinstatement of the action against the corporate defendants worked no injustice on

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* Plaintiffs, in effect, contend that $50,000 is not sufficient payment for nothing, because—so they claim—Fio Rito and Seeger received from Bruce even more for their worthless Coraloc shares. The fact is that Fio Rito's shares (including Seeger's) were bought by Bruce five months later to settle differences with Fio Rito unrelated to the purchase itself or to the value of the stock (81a). But plaintiffs could not show that they were damaged by the transaction even if it were assumed, for the sake of argument, that Bruce had agreed in advance to pay more for the shares of Fio Rito and Seeger.

** Coraloc is apparently a nominal defendant and since it was a subsidiary of Bruce, Bruce and Coraloc are treated in this context as one.

*** There is authority that the release of a defendant who is an alleged joint tort feasor operates to release all defendants.

plaintiffs. The ultimate failure of the claim against the corporate defendants for lack of proof of damage is a foregone conclusion. Certainly, the plaintiffs have not made the requisite showing of a reasonable expectation of success.

CONCLUSION

The case does not merit review by this Court and the petition should be denied.

Respectfully submitted,

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Counsel for Respondents
E. L. Bruce Co., Incorporated
and Coraloc Industries, Inc.

THOMAS FIELD,
PETER S. HELLER,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 435

GRADY L. WEST and CLIFFORD C. GRAHAM,

Petitioners,

vs.

EDWARD M. GILBERT, E. L. BRUCE CO., INCORPORATED, CORALOC INDUSTRIES, INC., WILLIAM A. FIO RITO, ISRAEL G. SEEGER, and VINCENT D'SUSA,

Respondents.

PETITIONERS' REPLY BRIEF

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Respondents.

PETITIONERS' REPLY BRIEF

It is perfectly plain from the Statement in Petitioners' Petition that none of the Respondents or their counsel knew of the dismissal of this action until counsel for Petitioners discovered the event and notified them thereof on September 17, 1965. It is also clear that no Respondent or their counsel knew or realized that an adjournment had not been granted on the June 5, 1964 calendar call—since all continued with the action even after the dismissal. It is further clear that Petitioners' counsel and Petitioners did continue actively in connection with the case subsequent to the deposition of Robert C. Leonhardt and that, *immediately* on learning of the dismissal, they took appropriate steps to vacate it and to restore the case to the calendar. It is also clear from the record that the action

was commenced August 23, 1962 and the order of dismissal entered just two years later on August 21, 1964 and that the Second Circuit was clearly in error when it said the case was two and one-half years old in June 1964.

The theory of the action is based on the fraud of the Respondents under Section 10(b) of the Securities Act of 1934 and Rule 10b-5 of the General Rules and Regulations promulgated thereunder. Thus the applicable statute of limitations is the six year limitation of Section 213(9) of the New York Civil Practice Law and Rules, since it was in New York that the alleged actions of Respondents occurred and in which the District Court is located. *Fischman* v. *Raytheon Mfg. Co.*, 188 F. 2d 783, 787 (2nd Cir. 1951); *Osborne* v. *Mallory*, 86 F. Supp. 869 (S.D.N.Y. 1949); *Philip* v. *J. H. Lederer Co., Inc.*, 1957—61 CCH Fed'l Sec. Rep., Par. 91039 (S.D.N.Y. 1961).

Pursuant thereto, the earliest date for the commencement of the running of such statute would be April 6, 1962, the date of the "conference" between Petitioners and Respondents. Despite their ability to reinstitute the action, Petitioners chose to move to vacate the dismissal, and thereafter to appeal to the Second Circuit and now to petition this court for certiorari, as it is their belief that the dismissal without notice, the refusal to vacate the dismissal and the failure to reverse such refusal, constitute an abuse of discretion under the circumstances present and in order to preserve in full effect voluminous pre-trial efforts in the action.

It is submitted that the merits of Petitioners' claims have been fully set forth and that the matter falls within the ambit of *Surowitz* v. *Hilton Hotels Corporation*, 383 U. S. 363; and that the decision of the Court of Appeals for the Second Circuit is in conflict with *Hill* v. *Hawes*, 320 U. S. 520 and *Radak* v. *Norwegian American Line Agency, Inc.*, 318 F. 2d 538 (2d Cir. 1963) and *Tozer* v. *Charles D. Krause Milling Co.*, 189 F. 2d 242 (3rd Cir. 1951).

CONCLUSION

It is respectfully submitted that, for the reasons set forth in the Petition for Certiorari and above, the Writ should issue.

Respectfully submitted,

RICHARD H. WELS,
Counsel for Petitioners.

JAMES L. ADLER, JR.,
Of Counsel.
October 7, 1966.

END